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No. 97-1337

In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA; MINNESOTA DEPARTMENT OF NATURAL RESOURCES; RODNEY SANDO, Commissioner of Natural Resources; ARNE CARLSON, Governor of Minnesota; RAYMOND B. HITCHCOCK, Assistant Commissioner of Operations, MINNESOTA DEPARTMENT OF NATURAL RESOURCES,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS ST. CROIX CHIPPEWA INDIANS OF WISCONSIN, SOKAOGON CHIPPEWA COMMUNITY AND LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN

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QUESTION PRESENTED

In an 1837 treaty, "the privilege of hunting, fishing, and gathering the wild rice" on lands and water ceded to the United States was "guarantied to the Indians, during the pleasure of the President of the United States." Does an 1850 executive order, which purported to "revoke" the privilege and order the Chippewa to remove from the ceded territory, bar enforcement of the privilege today, where:

a. the United States first suspended and then abondoned the order shortly after it was issued, federal officials recognized at the time that the Chippewa retained their usufructuary rights under the 1837 treaty, and it remains the pleasure of the President that the privilege be guaranteed to the Chippewa today;

b. the President had no authority in 1850 to order the Chippewa to remove from the 1837 ceded territory, and the sole purpose of the 1850 order was to remove the Chippewa; and

c. neither party to the 1837 treaty intended to authorize the President to "revoke" the privilege under the circumstances present in 1850; *viz.*, the Chippewa presented no impediment to settlement of the ceded terrritory, local citizens wanted them to remain on account of their contributions to timber and mining operations and the fish and fur trade, and removal would have been disastrous to the Chippewa?

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APPENDIX

Appendix A — Chippewa Land Cessions, 1837-1855 (Defs. Ex. 1, Page 13; Joint Appendix Page 956 ...	1a

Respondents St. Croix Chippewa Indians of Wisconsin, Sokaogon Chippewa Community and Lac Courte Oreilles Band of Lake Superior Chippewa Indians submit this brief in response to Minnesota's argument that the "privilege of hunting, fishing and gathering the wild rice" guaranteed in the 1837 Treaty with the Chippewa was permanently extinguished by an 1850 executive order. In providing that the privilege is "guarantied . . . *during* the pleasure of the President," the treaty conferred power on the President to determine *when* it should be guaranteed, but gave the President the no power to *extinguish* the privilege for all time. Because the 1850 order was suspended and abandoned by the United States shortly after it was issued, and it was then and remains today the pleasure of the President that the privilege should be guaranteed to and exercised by the Chippewa, the privilege is enforceable under the plain language of the treaty.

Moreover, the 1850 order was invalid when issued. The President had no authority to remove the Chippewa from the 1837 ceded territory. The purported revocation of hunting and fishing rights in the 1850 order was an integral part of an unlawful removal directive and cannot be severed from it. And, even if severable, the President's attempt to revoke the Chippewa's usufructuary privilege in 1850 exceeded his authority under the 1837 treaty. Under fundamental principles of contract and treaty interpretation, and the fiduciary duties imposed by the Northwest Ordinance and the trust responsibility, the President did not have unfettered discretion to withdraw the treaty guarantee. There is overwhelming evidence that *neither* party to the treaty intended to authorize the President to withdraw the privilege under the circumstances present in 1850.

STATEMENT OF THE CASE

A. Introduction And Procedural Background.

In the late 19th and early 20th century, states began enforcing fish and game laws that conflicted with traditional, treaty-protected Indian hunting and fishing practices. The conflict grew as states gave increasing preference to sport hunting and fishing, imposing restrictive seasons and bag limits that were inconsistent with Indian subsistence harvests. Indians could not eat by seasons, nor could sporting bag limits suffice for family sustenance. *See* T. Lund, *American Wildlife Law* 60-67, 90 (Univ. of Cal. Press 1980).

When the Chippewa and other Indians sought to hunt and fish without state interference under their treaties, the states claimed that Indian treaty

rights were subject to state regulation. In a seminal decision, this Court reconciled the competing interests; it held that the states could regulate off-reservation Indian hunting and fishing rights, but only to the extent necessary for conservation. *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942). Since *Tulee*, this and other courts have provided for the orderly implementation of such rights, permitting state regulation where necessary to protect public health and safety as well as to conserve natural resources, ensuring non-Indian access to scarce resources by placing a ceiling on Indian harvests, and protecting private property rights by limiting the exercise of the Indians' rights to lands open to public hunting and fishing, except where treaties secure access to specific fishing grounds.[1]

In Article 5 of the 1837 Chippewa treaty, the United States "guaranteed" that the Chippewa could hunt, fish and gather wild rice on lands and waters ceded to the United States "during the pleasure of the President." Petition Appendix ("PA") 486. The ceded territory is now located in Wisconsin and Minnesota. *See* map at Joint Appendix ("JA") 956 (App. A attached). In litigation involving the Wisconsin portion of the ceded territory, the Seventh Circuit held more than 15 years ago that the 1837 treaty rights were not terminated by the 1850 order, the United States supported that result, and this Court denied certiorari. *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341, 361-62 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983); JA 575-77. On remand, the district court implemented the treaty right based on the standards developed in *Tulee* and its progeny, and no party appealed from its final judgment. *See* PA 22 n.19.

In this case, brought initially by the Mille Lacs Band and involving the Minnesota portion of the same ceded territory, the district court, on an extensive historical record[2] and again at the urging of the United States,

1. *E.g. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 682 & n.25, 685-86 (1979); *Antoine v. Washington*, 420 U.S. 194, 207-08 & n.11 (1975); *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981); *Lac Courte Oreilles Band v. Wisconsin*, 775 F. Supp. 321, 323 (W.D. Wis. 1991); *Lac Courte Oreilles Band v. Wisconsin*, 668 F. Supp. 1233, 1237-42 (W.D. Wis. 1987); *State v. Miller*, 102 Wash. 2d 678, 687-88, 689 P.2d 81, 86 (1984); *People v. LeBlanc*, 399 Mich. 31, 61-64, 248 N.W. 2d 199, 214-15 (1976); *State v. Tinno*, 94 Idaho 759, 766, 497 P.2d 1386, 1393 (1972); *cf. United States v. Winans*, 198 U.S. 371, 381-82 (1905).

2. The court received over 400 exhibits, consisting primarily of historical documents, and heard from 11 expert witnesses, who submitted most of their (Cont'd)

held that the 1850 order did not extinguish the usufructuary privilege guaranteed in the 1837 treaty because: (1) the President had no authority to order the Chippewa to remove and the order could not be severed, PA 304-12; (2) even if severable the order exceeded the President's authority under the 1837 treaty, PA 312-16; and (3) the order was never carried out and was repealed, PA 319-21. The Wisconsin Bands intervened and the court's holding was applied to them, PA 201-02, and, in a separate case, to the Fond du Lac Band, PA 457-74. The United States, the Chippewa Bands and the State of Minnesota then stipulated to a regulatory and management system to implement the treaty right while protecting the State's interests in conservation, health and safety. PA 79-82. The system parallels state law in many respects, places ceilings on Chippewa harvests, and restricts the exercise of the right to public lands and a small category of private timber lands open to public hunting and fishing under state law. PA 79-82, 104-12, 137. The State did not challenge any aspect of this system on appeal. PA 14-16, 57-58 n.43, 73.[3]

The Eighth Circuit affirmed. With respect to the 1850 order, it held that, because the President had no authority to remove the Bands without their consent, and the Bands did not consent to remove from the 1837 ceded territory, the President had "no authority for his 1850 Executive Order of removal." PA 23-27. It held that the order to remove could not be severed from the purported revocation of hunting and fishing rights because "[t]he purpose of the Order was to mandate removal, and this purpose was integral to the entire Order." PA 27-31. The court did not address the other grounds on which the district court held the order ineffective. PA 31 n.25.

The Chippewa bands in this case have small reservations in the midst of the larger territory they ceded. Their rights to hunt, fish and gather according to their own customs on the lands they ceded is essential to the usefulness of their reservations. The State contends that the attempt to take away those rights in 1850, which was corrected within two years of its issuance, repudiated and long forgotten, should now be given new

(Cont'd)
direct testimony before trial in the form of written reports and were cross-examined extensively at trial. PA 218.

3. At oral argument in the Eighth Circuit the State's counsel represented that "[t]he State is not taking the position that the natural resources will be damaged *at all* by the lower court's decision here." 6-12-97 Oral Argument, Tape # 1 (emphasis added).

life. This would recreate an injustice that was successfully corrected long ago, and serve no purpose other than to suppress Chippewa hunting and fishing practices.[4] Fifteen years of experience in Wisconsin and the initial experience under the stipulations in this case demonstrate the compatibility of those practices with the conservation of natural resources and all public health and safety concerns. Like the lower federal courts in Wisconsin and Minnesota, where all of the people in question live, this Court should hold that the Chippewa's rights remain in force today.

B. Statement Of Facts

1. *The 1837 and 1842 Treaties.*

In 1837 the Chippewa country in northern Michigan, Wisconsin and Minnesota was a wilderness, in which only a few hundred non-Indians — fur traders, lumbermen and missionaries — could be found. The Chippewa survived by hunting, fishing and gathering, and by planting crops such as corn and squash. Following a seasonal round, they obtained virtually all of their material needs from the plants and animals in their environment. They were longstanding participants in the Northwest fur trade and supplied fish and game to miners and lumbermen entering their country.[5]

In 1837 Commissioner of Indian Affairs Carey Harris prepared instructions for a treaty to acquire a tract of land from the Chippewa, noting that the land was "valuable for the pine woods which cover it, but [was] unfit for cultivation." The instructions made no reference to the removal of the Chippewa, and contemplated that they would remain east of the Mississippi River, where they would receive Government annuities and possibly be joined by other Indians from Michigan. The instructions did not refer to the 1830 Indian Removal Act, and addressed none of the measures authorized in that Act to induce Indian tribes to remove.[6]

4. This case began because, under Minnesota law, traditional Chippewa harvesting techniques such as spring spear fishing and the use of nets to catch fish for subsistence purposes are prohibited. *See, e.g.*, Kegg Direct and Cross (JA 1230-32, 1239).

5. PA 221-24, 228; Cleland Rpt. (JA 592-612).

6. PA 228-29; 5-13-37 Harris to Dodge and Smith (JA 42-44); *see* Cleland Direct (JA 1018-19). The Removal Act authorized the President to divide lands west of the Mississippi into districts "for the reception of such tribes or nations of Indians *as may choose* to exchange the lands where they now reside, and remove there." (Emphasis added.) To induce removal, the Act authorized (Cont'd)

The Chippewa were summoned to Fort Snelling (near present-day St. Paul) for the treaty council. The district court found that translation between English and Chippewa presented a tremendous challenge. The two languages have radically different structures, and there are no Chippewa counterparts for the highly refined English legal vocabulary. The secretary to the treaty commission believed the interpreters were "unfit to act in that capacity."[7]

The United States' representative, Wisconsin Territorial Governor Henry Dodge, informed the Chippewa that the United States wanted to purchase their land "for the advantage of its Pine Timber." JA 46, 66. The Chippewa agreed to sell their lands, but insisted upon the privilege of hunting, fishing and gathering in the ceded territory.[8] A Chippewa spokesman, Ma-ghe-ga-bo, stated:

> I stand here to represent the Chiefs of the different bands of my nation assembled here, & to tell you of their determination, to sell you the lands that you want of them. My Father, listen to me. *Of all the country that we grant you we wish to hold on to a tree where we get our living, & to reserve the streams where we drink the waters that give us life.**

JA 69-70 (emphasis in original). The federal official transcribing the proceedings added a footnote to this statement, in which he commented:

> *This of course is nonsense — but is given *literally* as rendered by the Interpreters, who are unfit to act in that capacity. I presume it to mean that the Indians wish to reserve the privilege of hunting & fishing on the lands and making sugar from the Maple.

(Cont'd)
the President to: appraise and pay for improvements; provide assistance in removal and settlement; provide subsistence for one year after removal; "forever secure and guaranty" new lands to the tribes; and protect the tribes from disturbances in such lands. PA 225-26; Act of May 28, 1830, 4 Stat. 411-12 (JA 20-23).

7. PA 229-30; Nichols Rpt. (JA 845-50); Nichols Direct (JA 1152-56); 1837 Treaty Journal (JA 64-65, 70 n.5).

8. The State's anthropologist testified that preserving the ability to live off the land was of "paramount importance" to the Chippewa in the 1837 negotiations. Driben Cross (JA 1373-77).

JA 70 (emphasis in original). In return for their lands, Ma-ghe-ga-bo asked for an annuity for 60 years, after which "our grand children who will have grown up, can speak to you for themselves." JA 71. He added that "[i]f I have rightly understood you, we can remain on the lands and hunt there. We have heretofore got our living on them." JA 72. Dodge responded:

> It is proper for me to explain to you that your Great Father, never buys land for a term of years. I will agree on the part of the President, that you shall have the free use of the rivers, and the privilege of hunting upon the lands you are to sell to the United States, during his pleasure. If you sell these lands, you must sell them as all the other nations of Indians have done; & I tell you this now, that you may not, hereafter, say I have deceived you. [JA 73-74]

The next day Aish-ke-bo-gi-ko-zhe (Flat Mouth) reiterated that the Chippewa wanted the privilege to hunt, fish and gather on the ceded lands:

> My Father. Your children are willing to let you have their lands, but they wish to reserve the privilege of making sugar from the trees, and getting their living from the Lakes and rivers, as they have done heretofore, and of remaining in this Country. It is hard to give up the lands. They will remain, and can not be destroyed — but you may cut down the Trees, and others will grow up. You know we can not live, deprived of our Lakes and Rivers; There is some game on the lands yet: & for that reason also, we wish to remain upon them, to get a living. Sometimes we scrape the Trees and eat of the bark. The Great Spirit above, made the Earth, and causes it to produce, which enables us to live.

JA 75-76. Governor Dodge responded as follows:

> I will make known to your Great Father, your request to be permitted to make sugar, on the lands; and you will be allowed, during his pleasure, to hunt and fish on them. It will probably be many years, before your Great Father will want all these lands for the use of his white Children. [JA 78]

Later in the council the Chippewa reminded Dodge that "without

the lands, and the Rivers & Lakes, we could not live. We hunt, and make sugar, & dig roots upon the former, while we fish, and obtain Rice, and drink from the latter." JA 80. In discussing annuities they emphasized the need for goods that would assist them in their seasonal round of hunting, fishing and gathering: "With guns we get our living, & them you must remember." JA 87. There was no discussion of removal during the treaty council (*e.g.*, where they would go, whether new lands would be guaranteed to them, how they would subsist on the new lands, how they would get there, or what compensation they would receive for their improvements).[9] Dodge "wished them all — but more particularly those from that part of the country which he wished to buy, to *go home* satisfied," and assured them that "their Great Father The President of the United States would be just towards them." JA 66-67 (emphasis added).[10]

The 1837 treaty contains a cession of land within defined boundaries and the following reservation of hunting and fishing rights:

> The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States.[11]

Governor Dodge did not explain the phrase "during the pleasure of the President" during the treaty council and the district court found that the Chippewa did not understand it to give the President unfettered discretion to revoke the usufructuary privilege. Given the repeated assurances by Governor Dodge that the President (their "Great Father") would treat them justly, the Chippewa understood that the President would protect their rights, and would not revoke them without good cause.[12]

There is no provision for removal in the treaty. Governor Dodge described the results to Commissioner Harris in August 1837, and made

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9. PA 234, 237-38; *see* Cleland Direct (JA 1016-22).

10. Dodge repeated the assurance that the Government would treat the Chippewa justly at several points in the treaty council. JA 74, 86; *see* PA 223-24; Cleland Rpt. (JA 628-29); Driben Cross (JA 1381-82).

11. Treaty with the Chippewa, 1837, 7 Stat. 536 (July 29, 1837) (Art. 1, 5) (PA 484-89).

12. PA 235-37; Nichols Direct (JA 1159-61); Cleland Rpt. (JA 628-29); Cleland Direct (JA 1014-16).

no reference to removal.[13] On August 17, 1837, a missionary who attended the treaty council, William Boutwell, predicted trouble if the Government attempted to remove the Chippewa, because they had "no idea of leaving their country while they live — they know nothing of the duration of a man's pleasure." [14]

In 1842 the United States sought to acquire from the Chippewa a cession of their lands north of those ceded by the 1837 treaty, along the south shore of Lake Superior in Wisconsin and in Michigan's Upper Peninsula, including valuable mineral lands. Unlike the instructions for the 1837 treaty, the 1842 instructions expressly called for a treaty stipulation authorizing removal, while noting that it was "not likely that it [would] be necessary for [the Chippewa] to remove for a considerable time." [15] The 1842 treaty council took place at La Pointe and involved many of the same bands as the 1837 treaty. The Chippewa again insisted on the privilege of hunting, fishing and gathering on ceded lands, and strongly opposed any provision that would give the President authority to remove them from the ceded territory. They refused to sign the treaty until they received assurances that they would *not* be removed either during the term of their annuities (25 years) or their lifetimes, and for a longer period if they remained peaceable. Government officials confirmed that these assurances were given, and that without them no treaty could have been made.[16]

13. PA 238; 8-7-1837 Dodge to Harris (JA 94-97).

14. 8-17-1837 Boutwell to Greene (JA 99). *See also* 1-21-1851 Warren to Ramsey (JA 205) ("No provision has ever been made in any of their treaties contemplating [the Chippewa's] removal. . . . Whether this will go to prove that their early removal had not been heretofore contemplated by our Government or is mainly a want of foresight in the commissioners negotiating treaties with them, I will not presume to say.").

15. 8-1-1842 Crawford to Stuart (JA 116-17); *see* PA 241; Cleland Rpt. (JA 634-35).

16. PA 241, 255-56; Cleland Rpt. (JA 641-46); Cleland Direct (JA 1017); Newell Cross (JA 1323-55); 12-14-1853 Gilbert to Manypenny (JA 241); 11-6-1851 Buffalo to Lea (JA 226-27); 6-30-1851 Chippewa Address at Swan River (JA 218); 1-21-1851 Warren to Ramsey (JA 204-05); 1-21-1851 Treat to Lea (JA 199); 1-6-1851 Mendenhall to Lea (JA 196-97); 5-10-1850 Livermore to Brown (JA 174-75); 3-26-1850 Livermore to Ramsey (JA 167); 3-9-1850 Minnesota Chronicle and Register (JA 164-65); S. Doc. No. 403, 29th Cong. 1st Sess. 1-3 (June 24, 1846) (JA 130); 1-6-1843 Brunson to Doty (JA 121-22).

Article I of the 1842 treaty ceded lands in the State of Michigan and Territory of Wisconsin, north and east of those ceded in 1837, *see* App. A, and Article II reserved the "right of hunting" and "privileges of occupancy" in the 1842 ceded territory, until the Chippewa were "required to remove by the President of the United States." Article IV separately provided for removal from mineral lands "at the pleasure of the President of the United States." The treaty contains no provision authorizing removal from the 1837 ceded territory.[17]

2. *Issuance of the 1850 Order.*

In 1847 and 1848 Commissioner of Indian Affairs William Medill advocated purchase of Chippewa lands east of the Mississippi and their removal to the west. In 1847 he wrote instructions for a Chippewa treaty to acquire two tracts of land, immediately west of the 1837 cession, to which the Winnebago and Menominee could be removed, and to obtain a cession of the Chippewa's remaining lands east of the Mississippi and their agreement to remove to the west. The treaty commissioners successfully acquired land for the Winnebago and Menominee, *see* App. A, but were unable to secure a cession of Chippewa lands east of the Mississippi or Chippewa consent for removal.[18] The Chippewa, local citizens and missionaries opposed removal, because the lands occupied by the Chippewa were not needed for settlement, the Chippewa presence in the ceded territory was important to lumbermen, miners and fur traders, and there were no lands suitable for Chippewa resettlement.[19]

The impetus for an executive removal order came from the newly formed Minnesota Territory. In September 1849, Territorial Governor Alexander Ramsey asserted that settlers near Sauk Rapids and Swan River complained about the "demoralizing effects" of the 1837 privilege,

17. Treaty with the Chippewa, 1842, 7 Stat. 591 (Oct. 4, 1842); *see* PA 241 n.10.

18. PA 243-47; Treaty with the Chippewa of the Mississippi and Lake Superior, 1847, 9 Stat. 904 (Aug. 2, 1847); Treaty with the Pillager Band of Chippewa Indians, 1847, 9 Stat. 908 (Aug. 21, 1847).

19. PA 249-50; 2-25-1850 Hall to Treat (JA 156). The contemporaneous statements that the ceded lands were not wanted for settlement are corroborated by available demographic data. According to an expert retained by the Landowners, "in 1849 Minnesota Territory was little more than a wilderness." In 1850, there were only 892 whites in the Minnesota part of the 1837 ceded territory, or .09 persons per square mile. PA 245; Squires Rpt. (JA 911); White Rpt. (JA 873); Cleland Rpt. (JA 657-67).

and urged the Territorial Legislature "to memorialize the President of the United States, requesting him to notify the Chippeways that these privileges must cease and requiring them to move into their proper territory." In October the Legislature approved "Joint Resolutions *relative to the removal* of the Chippewa Indians from the ceded lands within the Territory of Minnesota," which resolved:

> that to ensure the security and tranquility of the white settlements in an expansive and valuable district of this Territory, the Chippewa Indians should be removed from all lands within the Territory to which the Indian Title has been extinguished, and that the privileges given to them by Article Fifth [of the 1837 treaty] and *Article Second [of the 1842 treaty]* be revoked.[20]

The claim that the Chippewa were interfering with settlers in Minnesota was not supported by the official record of depredation claims, which contained only one minor claim against the Chippewa at the time; indeed, although more serious claims were made against the Winnebago in the vicinity of Sauk Rapids and Swan River, Ramsey did not seek their removal.[21] Moreover, the agent for the Mississippi Chippewa contradicted Ramsey's account, stating that the Chippewa were "peaceable, temperate, and industrious." [22] When put in charge of implementing the removal order, Governor Ramsey took *no* steps to remove the Chippewa from the vicinity of Sauk Rapids or Swan River or to restrict their hunting and fishing privileges there, but instead focussed on bringing Chippewa *to* Minnesota, in closer proximity to these Mississippi River settlements.[23]

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20. PA 250-52; White Rpt. (JA 878); 11-7-1849 Joint Resolutions (PA 566) (emphasis added).

21. PA 250-51, 252; White Direct (JA 1096, 1098-99); Cleland Rpt. (JA 653).

22. PA 251; 9-22-1849 Fletcher to Ramsey (JA 146).

23. PA 267-68; Cleland Rpt. (JA 677); Cleland Direct (JA 1025-26); White Direct (JA 1099). With respect to the Mille Lacs Chippewa, Governor Ramsey himself wrote in 1850 that they were "forty or fifty miles from any white settlement" and prospered from abundant resources of the area. In 1851 he wrote that they "have for some years evinced an improving disposition" and instructed the Indian agent to assist them in farming at Mille Lacs (*i.e.* within the 1837 ceded territory). PA 268. In 1852, two newspapers reported

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On this record, the district court found that Minnesota politicians, including Ramsey, advocated removal not because of settler complaints, but because they wanted to bring the Chippewa *from* Wisconsin *to* Minnesota, "to obtain more of the economic benefits generated by having a large number of Indians residing in their territory." PA 251. This purpose was illustrated by the extra-territorial scope of the resolutions. *All* of the lands ceded in the 1842 treaty were in Michigan and Wisconsin, and a substantial portion of those ceded in the 1837 treaty were in Wisconsin. Revoking the Chippewa's usufructuary privileges in Michigan and Wisconsin would not help "ensure the security and tranquility of white settlements" in Minnesota. However, moving the Chippewa from Michigan and Wisconsin *to* Minnesota would have important benefits for the Territory: Minnesota traders would be more likely to benefit from the annuity payments made to the Chippewa; Minnesota businesses would be able to compete for the lucrative business of supplying and transporting annuity goods; and Minnesota would receive money from and patronage opportunities at Indian agencies and their schools, farms and blacksmith establishments. As Henry Rice, an influential fur trader on the upper Mississippi, wrote to Governor Ramsey, "Minnesota would reap the benefit [from the Chippewa's removal] whereas now their annuities pass via Detroit and not one dollar do our inhabitants get." [24]

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that the Mille Lacs Chippewa supplied venison, fish, fowl, berries and wild rice to lumbermen operating on the Rum River and helped make it "the most desirable point for lumbering that has yet been discovered in Minnesota." PA 269; Cleland Rpt. (JA 611-12).

24. PA 251-52; Cleland Rpt. (JA 668-71, 674); White Direct (JA 1095); 12-1-1849 Rice to Ramsey (JA 149-50); *see also* 2-15-1850 Rice to Ramsey (JA 152) ("removing the indians of Lake Superior to and paying them annuities on the Mississippi will have a *great influence on Minnesota,* especially St. Paul") (emphasis added); 12-31-1853 Hall to Treat (Pls. Exh. 98 at 10) (Removal "is a political business brought about through the influence of persons interested in the growth of this territory. They desire to get the Indians here, because it will bring more business and money into the territory.").

The State's expert cited two published historical accounts of the 1850 order, both of which conclude that the order was not motivated by settler complaints, but by the desire to bring more Chippewa *to* Minnesota for economic reasons. Driben "Armstrong" Rpt. (Defs. Exh. 5 at 8-9 n.26), *citing* R. Satz, *Chippewa Treaty Rights* 52-53 (Wis. Academy of Sciences, Arts and

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Ramsey and Rice lobbied for an executive removal order in Washington D.C. and on February 6, 1850, President Taylor signed the following order:

> The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the Fifth Article of the Treaty made with them on the 29th of July 1837 "of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" by that treaty to the United States; and the right granted to the Chippewa Indians of the Mississippi and Lake Superior, by the Second Article of the treaty with them of October 4th 1842, of hunting on the territory which they ceded by that treaty, "with the other usual privileges of occupancy until required to remove by the President of the United States," are hereby revoked; and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.

Commissioner of Indian Affairs Brown sent the order to Ramsey on the same day. His transmittal letter addressed steps to remove the Chippewa, but made no suggestion that Chippewa hunting, fishing and gathering activities should be restricted. Brown referred to his "late annual report" for an explanation of "the policy of the measure," which likewise focussed on removal, not hunting, fishing and gathering rights.[25]

Upon receipt of Commissioner Brown's letter, Governor Ramsey sent instructions to the La Pointe sub-agent, John Livermore, enclosing "a copy of the order of the President *for the removal* of the Chippewas, from the lands they have ceded *in Wisconsin*." Ramsey made no reference to the removal of the Chippewa from lands ceded in Minnesota, or to the revocation of usufructuary privileges.[26] Livermore prepared a circular to notify the *Wisconsin* bands of the order, but made no reference to the

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Letters 1991) (lodged with the Court by respondents Bad River Band *et al.*); Clifton, *Wisconsin Death March: Explaining the Extremes in Old Northwest Indian Removal*, 75 Trans. of the Wis. Academy of Sciences, Arts and Letters 1, 19-20 (1987) (JA 1681-82).

25. PA 253-54, 310; 2-6-1850 Order (PA 565).

26. PA 254; 3-4-1850 Ramsey to Livermore (JA 161) (emphasis added).

revocation of hunting and fishing privileges.[27] No efforts were ever made to remove the Chippewa from the portion of the 1837 ceded territory in Minnesota.[28]

In Michigan and Wisconsin local citizens protested the order. One such letter to President Taylor stated that

> the miners experience no inconvenience from [the Chippewa] being in the same country — indeed they are some advantage[ ], being sometimes employed as laborers or as fishermen: & I have never known any other than the most friendly intercourse to exist between them.[29]

A July 1850 petition to the President signed by nearly "every principal man in business in the country" stated that removal was "*wholly uncalled for by any interest of the Government or people of the United States*, and that it would be in a high degree prejudicial to the welfare of the Indians." It added that the lands occupied by the Indians were "undesirable for agricultural purposes, and not demanded by any influx of white settlers," and that "the most friendly feelings, strengthened by mutual kind offices, has at all times, existed between the Indians and ourselves." [30]

Although the Chippewa were told that removal was ordered "on strength of the [1842] treaty," they believed it was unauthorized by either the 1837 or the 1842 treaty, and federal officials verified that it violated the assurances they received in 1842 that they would not be required to remove so long as they were peaceable.[31] Moreover, the lands to which the Government sought to remove them were occupied by bands who had not agreed to receive them, and were insufficient to support those to

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27. PA 256-57; *see also* 3-26-1850 Livermore to Ramsey (JA 168) (notice of removal deferred while Chippewa hunt and make sugar).

28. PA 267; Cleland Rpt. (JA 677). Some St. Croix Chippewa on the Minnesota-Wisconsin border were later removed to Mille Lacs (within the 1837 ceded territory), but soon returned home. PA 267; Newell Cross (JA 1353-54).

29. 5-9-1850 Mendenhall to Taylor (Pls. Exh. 92 at 1); *see* Cleland Rpt. (JA 654-55).

30. 7-30-1850 Giddings to President (Pls. Exh. 93) (emphasis added); *see* 1-6-1851 Mendenhall to Lea (JA 190).

31. PA 255-56; 6-30-1851 Chippewa Address at Swan River (JA 218); p. 8 above.

be removed and those already living there.[32] By 1850 the Chippewa had purchased lands and homes in the ceded territory, and they did not want to leave their homes and burial grounds or the territories where they hunted, fished and gathered.[33]

To circumvent the opposition to removal, Governor Ramsey planned the 1850 annuity payment "in such a way as to interpose obstacles to a return to the country they left." Removal Agent Watrous told the Chippewa that they had to be at Sandy Lake, Minnesota, by October 25 to receive the payment. By November 10, almost 4,000 Chippewa had gathered there, but Agent Watrous did not arrive until November 24, and the annuity goods were not distributed until December 2.[34] Measles and dysentery broke out while the Chippewa were waiting, and 150 to 170 died. Another 230 Chippewa perished on the difficult winter trip home to Wisconsin.[35]

3. *Suspension and Abandonment of the 1850 Order.*

On June 3, 1851, Commissioner of Indian Affairs Luke Lea wrote to the Secretary of the Interior recommending that the President's order be modified to permit the Chippewa "to remain for the present in the country they now occupy." Lea explained that when the effect of the order became known, "communications from sources of the highest consideration . . . were received at this office remonstrating in strong terms against the application of the order to these Indians." Lea concluded that removal of the Chippewa was "*not required by the interests of the citizens or Government of the United States and would in its consequences in all probability be disastrous to the Indians*," and recommended that "the order of the President be modified as to permit such portions of

32. PA 255; 1-21-1851 Treat to Lea (JA 200); 1-6-1851 Mendenhall to Lea (JA 192-93); 3-26-1850 Livermore to Ramsey (JA 171); 4-25-1850 C. Beaulieu to Borup (JA 176); *see* Newell Cross (JA 1341).

33. PA 255; 1-6-1851 Mendenhall to Lea (JA 195-96).

34. PA 257. Congress appropriated $25,000 on September 30, 1850, "for expenses of removal and subsistence of the Chippewas of Lake Superior and Mississippi from the lands ceded under the [1842] Treaty." 9 Stat. 544 (PA 525). It appropriated another $25,000 on February 27, 1851, "[f]or expenses of removal and subsistence of the Chippewas of Lake Superior and the Mississippi from the lands ceded under the Treaties of [1837] and [1842]." 9 Stat. 570 (PA 530).

35. PA 257-60; 1-21-1851 Warren to Ramsey (JA 206-07); 11-6-1851 Buffalo to Lea (JA 227-29).

those bands as may desire it to remain for the present in the country they now occupy." [36]

On August 23, 1851, the Acting Commissioner of Indian Affairs informed the Secretary of the Interior that 1,000 Chippewa were assembled at La Pointe but could not be removed without the aid of troops. He reiterated the concerns expressed in Lea's June 3rd letter, and sought the Secretary's authorization "to instruct Agent Watrous to suspend the removal of these Indians until the determination of the President upon the recommendation of the commissioner is made known to this office." Two days later the Secretary authorized Lea "to suspend the removal of the Chippeway Indians until the final determination of the President upon the subject of your letter of the 3rd June 1851," and Lea telegraphed Watrous to "[s]uspend action with reference to the removal of the Lake Superior Chippewas for further orders." [37]

In Minnesota, Governor Ramsey agreed that "*no pressing necessity exists for [the Chippewa's] immediate removal, so far as the interests, rights, prejudices even of our citizens are concerned*, who inhabit the lands they have ceded but continue to occupy." Although Governor Ramsey recommended, and Commissioner Lea approved, a policy of only paying annuities on unceded lands to those Indians who removed, very few Chippewa actually removed, and those who did quickly returned. A Lake Superior missionary, Rev. Wheeler, wrote in March 1852 that the "end has now come" to the removal effort, the $50,000 expended by the Government was "worse than wasted," and the Indians have "nearly all returned to their old homes." Because they did not receive annuity payments in 1852, "more of [the Chippewa] than usual have gone a hunting, their furs bringing them the ready cash or its equivalent in something else." No government official made any attempt to prevent the Chippewa from pursuing these activities.[38]

In 1853, the Government reversed the policy of only paying annuities to those who had removed and, in so doing, made it clear that the

36. PA 259; 6-3-1851 Lea to Stuart (JA 214-15) (emphasis added).

37. PA 259-61; White Direct (JA 1106-08); 8-25-1851 Lea to Watrous (JA 225); 8-25-1851 [Graham] to Commissioner (JA 225); 8-23-1851 Mix to Graham (JA 223).

38. PA 261-63; 12-26-1851 Ramsey to Lea (JA 235) (emphasis added); 3-2-1852 Wheeler to Treat (Pls. Exh. 227 at 1); 11-20-1852 Wheeler to Treat (Pls. Exh. 105 at 1).

Chippewa could continue to exercise their usufructuary privileges on ceded lands. In that year President Pierce took office and appointed George Manypenny as Commissioner of Indians Affairs and Willis Gorman as Governor and *ex officio* Superintendent of Indian Affairs of the Minnesota Territory. The Indian Office appointed Henry Gilbert as a Special Agent to make the annuity payment to the Lake Superior Chippewa and authorized Governor Gorman to pay the other Wisconsin bands on the St. Croix River, within the 1837 ceded territory. The payments included hunting and fishing equipment, such as powder, lead and shot. Rev. Wheeler wrote that it was "almost certain that no further efforts will be made to remove these Indians," and that the removal effort was not only a failure, but "seen by the Department in Washington to have originated with a few designing men who wanted the Indians removed that they might get their money." [39]

After the La Pointe payment, Agent Gilbert reported that the removal order was "the great terror of [the Chippewa's] lives." He confirmed that they had been assured that they would *not* be removed at the 1842 treaty council, and recommended that the "policy of removal" be abandoned, that the Chippewa be given land near their present homes, and that they receive their annuity payments within the ceded territory.[40] He also "advert[ed] to the perfectly good understanding & harmony existing between the white residents of the country & the Indians," and stated that "it seems hardly possible that any collision, or even inconvenience can result from permitting the Indians to become permanently domiciled in the country." Gilbert linked his recommendations to the prospects for a new treaty to acquire unceded Chippewa lands on the north shore of Lake Superior.[41] Minnesota Governor Gorman also recognized the need to smooth the way for a new treaty, and emphasized the importance of assisting the Chippewa in hunting and fishing:

> I also felt that soon a treaty would have to be made with those Indians for the Lake Superior country and it was in my [judgment] highly expedient that *all those ill founded*

39. PA 264-65;10-27-1853 Wheeler to Father (JA 237).

40. Gilbert understood that the Chippewa would continue to hunt, fish and gather in the ceded territory under such an arrangement. When the Chippewa asked that their 1837 and 1842 annuities include more guns and traps, he recommended that these "obviously necessary" articles be provided. 5-27-1854 Gilbert to Manypenny (Pls. Exh. 121); PA 265-66.

41. PA 265-66; 12-14-1853 Gilbert to Manypenny (JA 239-44).

> *prejudices growing out of past transactions should be dispelled if possible with a view to said Treaty.* I therefore on the 8th December last gave them one Blanket each, and some Calico, and other clothing, together with a small quantity of provisions and powder and lead, *to enable them to hunt and thereby support their women and children.*[42]

4. *The 1854 and 1855 Treaties.*

In May and June 1854 Congress considered a bill to authorize a treaty "for the extinguishment of the title of the Chippewa Indians to the lands owned and claimed by them in the Territory of Minnesota and the State of Wisconsin." Contrary to the stated objectives of the 1850 order, the Chippewa would receive lands where they were living: "The [House Indian Affairs] committee desire that they shall be allowed to remain on their own lands, and cultivate the same; and we are informed that such is the desire of the people of Minnesota." The House sponsor explained that

> we have had experience enough that the policy we have heretofore pursued of extinguishing the title of the Indian lands, removing them further West, and paying them large money annuities, has been demonstrated by experiment to be an *utter failure*.

The Senate sponsor added that while the bill contemplated opening Indian lands to settlement and mining, it did "not design to remove the Indians at all." Rather, it "prescribes . . . that the Indians shall *not be removed* from the territory . . . and it *reserves to them those rights which are secured by former treaties*." [43]

Although the bill did not pass the Senate until December, Commissioner Manypenny authorized Agent Gilbert to conduct treaty negotiations when he assembled the Chippewa for the fall annuity payment. He sought to acquire "all the country" the Chippewa still owned, with the exception of 743,000 acres for reservations.[44] Gilbert reported to Manypenny in October 1854 that the Chippewa "strenuously insisted"

42. 2-6-1854 Gorman to Commissioner (Pls. Exh. 125 at 1) (emphasis added).

43. PA 272; 23 Cong. Globe, 33rd Cong., 1st Sess 1032, 1403-04 (1854) (emphasis added).

44. PA 273; 8-11-1854 Manypenny to Gilbert (JA 263-64); 8-12-1854 Manypenny to Gilbert (JA 269).

both on "the privilege of remaining in the country where they reside" and on the reservation of lands for their homes, and that the treaty could not have been made if he had not yielded these two points. The reservations made by the treaty contained less than 300,000 acres altogether, and were located on lands ceded in 1837, 1842 and 1854. Gilbert recognized that the Chippewa would be leaving the reservations to engage in usufructuary activities, noting that a large portion of the land reserved for the La Pointe band was "valueless except as it gives them access to [Lake Superior] for fishing purposes." [45] He assured the Chippewa that the reservations "were not to confine [them] all together to live upon them — that [they] should have the privilege of going out of [them] whenever [they] had a mind for hunting purposes." [46]

In addition to establishing reservations on ceded lands, the treaty provided in Article 4 for payments of "two hundred guns, one hundred rifles, five hundred beaver traps, [and] three hundred dollars worth of ammunition." Article 11 pledged that the Chippewa would not be removed, and reserved usufructuary rights on newly ceded lands:

> *[T]he Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.*[47]

In his 1854 annual report, Commissioner Manypenny explained the status of the Chippewa bands within the 1837 and 1842 cessions:

> *It has not, thus far, been found necessary or practicable to remove them.* They are very unwilling to relinquish their present residences, as are all the other bands of the same Indians; and *it may be necessary to permit them all to*

45. PA 273-75; 10-17-1854 Gilbert to Manypenny (JA 271-73) (emphasis added). The reservations established in the treaties were like "postage stamps" within the ceded territory; absent the ability to hunt, fish and gather off-reservation the Chippewa would have starved. Cleland Direct (JA 1029-30, 1033, 1041-42); Cleland Rpt. (JA 728-30).

46. PA 274; 1863 Treaty Council (JA 381).

47. PA 274; Treaty with the Chippewa, 10 Stat. 1109 (Sept. 30, 1854) (PA 490-97) (emphasis added). The President has never revoked or otherwise modified the hunting and fishing rights reserved in the 1854 treaty. PA 419, 446.

> *remain, in order to acquire a cession of the large tract of country they still own east of the Mississippi, which, on account of its great mineral resources, it is an object of material importance to obtain.*[48]

Two weeks later Manypenny forwarded the 1854 treaty, along with Agent Gilbert's report, to Secretary of the Interior McClelland. After Congress passed the bill authorizing the treaty, the President forwarded it to the Senate, where it was ratified.[49]

The 1855 Chippewa treaty is discussed at length in the district court's findings. PA 275-92. It established an additional reservation within the 1837 ceded territory as a "permanent home" for the Mille Lacs Band. Like the reservations established in the 1854 treaty, the small Mille Lacs Reservation provided access to important off-reservation resources, upon which the band depended for its survival.[50]

5. *Post-Treaty Developments.*

In February 1855 Governor Gorman wrote to Commissioner Manypenny about a lumbermen's dam that flooded wild rice beds used by the Mille Lacs Chippewa. In discussing the competing interests, Governor Gorman recognized that the Chippewa retained hunting and fishing rights on lands they had ceded to the United States:

> The lands occupied by the timbermen have been surveyed and sold by the United States and *the Indians have no other treaty interests except hunting and fishing. . . .*

Governor Gorman's letter makes it clear that the lands were ceded in the 1837 treaty, and the retained hunting and fishing rights were those secured by Article 5 of the 1837 treaty.[51] In addition to Governor Gorman, the lumbermen, other non-Indians and all of the Indians believed that the Chippewa retained their rights under the 1837 treaty,

48. PA 266-67;1854 Annual Report (JA 279) (emphasis added).

49. PA 275; Sen. Exec. No. 5, 33rd Cong., 2d Sess. (Jan. 4, 1855) (JA 282-85); Act of December 19, 1854, 10 Stat. 598 (PA 532-34); 24 Cong. Globe, 33rd Cong. 2d Sess. 53-54 (Dec. 14, 1854) (Pls. Exh. 137).

50. PA 283, 292; Treaty with the Chippewa, 1855, 10 Stat. 1165 (PA 503-04); Cleland Direct (JA 1042).

51. PA 269-70; 2-16-1855 Gorman to Manypenny (JA 295-96) (emphasis added); Cleland Direct (JA 1030-31). The State's expert agreed that Gorman was referring to hunting and fishing rights under the 1837 treaty. Newell Cross (JA 1308-10).

and Governor Gorman repeated his position in a letter to the Chippewa.[52] Neither Commissioner Manypenny, Secretary McClelland (who was involved in the ultimate resolution of the dam controversy), nor anyone else disputed Gorman's statement that the Chippewa retained hunting and fishing privileges under the 1837 treaty.[53]

There is no reference in the historical record to the 1850 order for the next 75 years, although the Chippewa continued to hunt, fish and gather throughout the 1837 ceded territory. Notwithstanding sporadic efforts by the State of Minnesota to confine the Chippewa to their reservations,[54] the United States affirmatively supported these activities, supplying guns, traps, fish nets and other implements, and agreeing to make annuity payments at times that would not interfere with seasonal harvesting patterns.[55] During the last decade of the 19th century, as Wisconsin and Minnesota began systematic efforts to enforce their fish and game laws against the Chippewa, the Chippewa protested that they had rights to hunt, fish and gather under the 1837, 1842 and 1854 treaties.[56] In 1897, the United States Attorney for Minnesota argued that the State had no power to interfere with the privileges reserved in the 1837 and 1854 treaties, and Minnesota's Attorney General agreed. In 1925, the Commissioner of Indian Affairs believed there was "merit in the claims of the Indians" under the 1837 and 1854 treaties, and suggested a test case be initiated.[57]

During this 75-year period, despite controversy over off-reservation hunting and fishing, no one claimed that the Chippewa's rights had been revoked by the 1850 order. In two cases before this Court, the United

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52. PA 270-71; 6-4-1855 Petition, Garland *et al.* to Gorman (Pls. Exh. 20 at MN 10135); 6-4-1855 Gorman to Little Hill (Pls. Exh. 19 at 1); 3-9-1855 Hamilton to Stewart (JA 360).

53. PA 271 n.13; Cleland Rpt. (JA 708-12); White Direct (JA 1112).

54. *E.g.* Act of July 28, 1858 (PA 570-71); McClurken Rpt. (JA 838).

55. PA 292-93, 299, 326; Cleland Rpt. (JA 598-607, 753-67); McClurken Rpt. (JA 829-37).

56. PA 298-99, 326-27; Cleland Rpt. (JA 757, 761-62); 12-14-1928 Superintendent to Commissioner (JA 1804).

57. PA 299, 326-27 & n.21; Cleland Rpt. (JA 762-65); 4-15-1897 Scott to Commissioner (JA 529-35); 12-9-1925 Merritt to Hammitt (JA 540-41); 12-2-1928 Burke to Hammitt (JA 545-46).

States represented and the Court found that the Chippewa had never been removed and their "privileges of occupancy" under the 1842 treaty had never been revoked. *See Wisconsin v. Hitchcock*, 201 U.S. 202, 213-14 (1906); *United States v. Thomas*, 151 U.S. 577, 582 (1894); JA 506. It was not until 1930 that anyone asserted the Chippewa's rights had been abrogated by the 1850 order. This assertion was reiterated by a variety of officials in the 1930s and early 1940s, including in one case by President Roosevelt, but it was not accompanied by analysis of the circumstances surrounding the issuance or abandonment of the order. PA 300. When the Executive Branch fully examined those circumstances in a Court of Claims case involving the ownership of swamp lands within some of the Wisconsin reservations, it asserted that the order had no effect on the Chippewa's treaty rights. In 1947 and 1948, the United States argued that the "right of occupancy" under Article II of the 1842 treaty was unaffected by the 1850 order because "the Executive Order was never carried out." In 1954 it added that: (1) "Congress did not act as though the order was effective"; (2) the 1854 treaty "in effect canceled the President's Executive Order"; and (3) in its contemporaneous "administrative interpretations . . . the United States never considered that the Indian rights were terminated thereby."[58]

The United States has since taken the same position with respect to the effect of the 1850 order on the hunting and fishing privileges in the 1837 and 1842 treaties. In the *Lac Courte Oreilles* litigation, Solicitor General Lee informed this Court that, "[w]hether or not valid and authorized, the 1850 Executive Order does not determine the legal issues at hand because the Order was never enforced" and, in fact, "was quickly abandoned as the policy of the United States, and superseded by the Treaty of La Pointe."[59] The United States has argued throughout this case that the 1850 order has no present effect on the usufructuary privileges guaranteed to the Chippewa in the 1837 treaty, both because it was invalid when issued and because it was abandoned by the Executive Branch.

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58. *Mole Lake Band v. United States*, Ct. Cl. No. 45162(I), Dfs. Obj. to Findings (Jan. 3, 1947) (JA 556-58); Dfs. Req. for Findings (July 23, 1948) (JA 559-61); Dfs. Obj. to Findings (Mar. 1, 1954) (JA 562-65). The effect of the 1850 order was not decided in the *Mole Lake* case. PA 43-44.

59. United States' Motion to Dismiss and Affirm at 12-13, *Besadny v. Lac Courte Oreilles Band*, 464 U.S. 805 (1983) (No. 83-6) (JA 575-76).

Moreover, for many years the United States Fish and Wildlife Service has promulgated annual regulations under the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 *et seq.*, that affirmatively provide for the exercise of Chippewa hunting rights under the 1837 and 1842 treaties.[60] In 1992 Minnesota objected to these regulations on the ground that the *Lac Courte Oreilles* decision was binding only in Wisconsin and not in Minnesota. The Service responded that "the United States Government" recognized the rights, that the treaties cover Minnesota (and Michigan) as well as Wisconsin, and that the Service had implemented the rights in all three states for many years. 57 Fed. Reg. 35,446, 35,450 (Aug. 7, 1992).

In the late 1980s, non-Indians protested Chippewa exercise of their 1837 and 1842 treaty rights. Congress held hearings, but rejected bills to abrogate the hunting and fishing rights reserved in those treaties.[61] For the past 15 years, at the request of the Reagan, Bush and Clinton administrations, Congress has made annual appropriations to help fund implementation of the Chippewa's usufructuary privileges under the 1837 and 1842 treaties.[62] In addition, after meetings among the Chairman of

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60. For recent examples, *see* 62 Fed. Reg. 46,420, 46,422-23 (Sept. 2, 1997); 61 Fed. Reg. 46,352, 46,355 (Aug. 30, 1996).

61. *See* Anti-Indian Violence, Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary, H. Rep., 100th Cong., 2d Sess., Serial No. 119, 125-440 (1988); Satz, note 24 above, at 116-17 ("neither Congress nor the President would abrogate" Chippewa hunting and fishing rights under the 1837 treaty, despite the introduction of two bills to do so); H.R. Bill 3034, 100th Cong., 1st Sess. (July 28, 1987); H.R. Bill 2058, 101st Cong., 1st Sess. (Apr. 18, 1989); S.J. Res. 119, 101st Cong., 1st Sess. (May 4, 1989).

62. The purpose of these appropriations, the amount appropriated in the prior year, and the current year's request are set forth in the Interior Department's budget justifications, which make specific references to the hunting, fishing and gathering rights recognized in *Lac Courte Oreilles* and related cases and their implementation in Minnesota, Wisconsin and Michigan. *See* U.S. Dept. of the Interior Budget Justifications: F.Y. 1999 at p. BIA 133; F.Y. 1998 at pp. BIA 111-12; F.Y. 1997 at p. BIA 99-100; F.Y. 1996 at p. BIA 113-14; F.Y. 1995 at p. BIA 101; F.Y. 1994 at p. BIA 94; F.Y. 1993 at p. BIA 106; F.Y. 1992 at p. BIA 123; F.Y. 1991 at p. BIA 163; F.Y. 1990 at p. BIA 128; F.Y. 1989 at p. BIA 135; F.Y. 1988 at p. BIA 160; F.Y. 1987 at p. BIA 137; F.Y. 1986 at p. BIA 162; F.Y. 1985 at p. BIA 151. When a change in funding from the previous year is proposed, it is generally addressed in

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the Senate Committee on Indian Affairs, "representatives of the President of the United States" and state and tribal officials, in which a "commonly-shared perception" emerged that "the fires of controversy were being fueled by a campaign of misinformation regarding the impact of Indian treaty fishing," Congress appropriated funds for a scientific study of the matter. The joint federal-state-tribal study concluded that "Chippewa spearing has not harmed the resource," and emphasized the continuing importance of hunting and fishing to the Chippewa's culture and well-being today, a point confirmed by the trial testimony of three Mille Lacs Band members in this case.[63]

SUMMARY OF ARGUMENT

The State argues that the privilege set forth in the 1837 treaty is not enforceable today because the plain language of the treaty authorized the President, in his unfettered discretion, to terminate the privilege, and President Taylor did so in 1850. This argument fails for three reasons. *First*, the treaty provides that the "privilege . . . is guarantied . . . during the pleasure of the President." This language does not authorize one president to terminate the privilege; rather, it creates a continuing privilege that can be exercised at the President's pleasure. Thus, while President Taylor could enforce or suspend the privilege, he could not extinguish it for all time regardless of the pleasure of his successors.

The district court found that the 1850 order purported to revoke the Chippewa's hunting and fishing privilege for the sole purpose of facilitating their removal. However, shortly after the order was issued, and before its purported revocation of hunting and fishing privileges took effect, the entire order was suspended and abandoned by President

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congressional committee reports. H.R. Rep. No. 626, 102d Cong. 2d Sess. 51 (1992) (increase for "biological services and conservation enforcement in Minnesota, Wisconsin and Michigan"); S. Rep. No. 122, 102d Cong., 1st Sess. 58-59 (1991) (increase for "rights protection implementation programs"); S. Rep. No. 534, 101st Cong., 2d Sess. 62 (1990) (increase "under [Lac Courte Oreilles] case management").

63. U.S. Dept. of the Interior, *Casting Light Upon the Waters: A Joint Fishery Assessment of the Wisconsin Ceded Territory* 3, 13, 93 (2d ed., Jan. 1993) (lodged with the Court by respondents Bad River Band et al.); Kegg Direct (JA 1221-36); Boyd Direct (JA 1241-55); Dunkley Direct (JA 1261-75).

Taylor's successors. In 1855 President Pierce's appointee, Minnesota Territorial Governor Gorman, recognized that the Chippewa retained the privilege to hunt and fish under the 1837 treaty, *i.e.*, that it was the *President's pleasure* that they be allowed to do so, and no one suggested otherwise for the next 75 years.

The rediscovery of the 1850 order in the 1930s and early 1940s was not accompanied by analysis of its historical circumstances. With the benefit of such analysis, the Executive Branch has made it clear over the past 50 years that the 1850 order has no continuing force or effect and that it remains the President's pleasure that the Chippewa may exercise their rights under the 1837 treaty. Because it is the pleasure of the President that the 1837 privilege be guaranteed to the Chippewa, the privilege is enforceable under the plain language of the treaty.

Second, the lower courts held, *and the State does not dispute*, that the 1850 order's directive to remove was unlawful. That unlawful directive cannot be severed from the purported revocation of usufructuary privileges because, as the lower courts found, the sole purpose of the order was to remove the Chippewa, and a revocation of the Chippewa's usufructuary privileges in the absence of removal would have been contrary to the goals of the order. The State's argument that the President would have revoked the 1837 privilege to *encourage* the Chippewa to remove cannot be reconciled with its concession that, even without the privilege, the Chippewa could still have hunted and fished in the ceded territory under state and territorial law. An order revoking the privilege would not have "encouraged" the Chippewa to remove under these circumstances. Moreover, as the court of appeals noted, there is not a shred of evidence that anyone ever considered, let alone proposed, such a scheme.

Third, even if severable from the unlawful removal directive, the purported revocation of the hunting and fishing privilege was itself invalid because it exceeded the President's authority under the 1837 treaty. It is a fundamental rule of contract and treaty law that authority conferred on one party must be exercised in good faith, *i.e.*, it cannot be exercised in a manner that the parties would not have countenanced at the time the agreement was made. That doctrine is reinforced here by the special, fiduciary relationship between the United States and Indian tribes. Given the paramount importance of the usufructuary privilege to the Chippewa, the assurances they received of just treatment during the treaty negotiations, and the fiduciary relationship between the Chippewa and

the United States, the treaty cannot fairly be construed to confer *unfettered* discretion on the President to revoke the Chippewa's usufructuary rights at any time and for any reason. When the President purported to revoke their rights as part of an unlawful removal effort, at a time when the Chippewa were peaceable, their lands were not needed for settlement, and they were contributing valuable products to local citizens who wanted them to remain, the President acted in a manner that was not authorized by the 1837 treaty.

There is no reason for the Court to give effect to the tragic and short-lived 1850 order today over the objections of the United States. The President and Congress retain authority over the exercise of the privilege, and the principles developed by this Court allow for the implementation of the privilege in a manner that protects core interests of the State (natural resource conservation, public health and public safety), as well as the interests of private landowners. The State's interest in requiring Chippewa adherence to seasons, bag limits and gear restrictions designed for sport hunting and fishing cannot justify disregarding the privilege expressly guaranteed in the 1837 treaty.

ARGUMENT

I. THE PRIVILEGE IS ENFORCEABLE UNDER THE PLAIN LANGUAGE OF THE 1837 TREATY.

The 1837 treaty provides that the "privilege of hunting, fishing, and gathering the wild rice . . . is guarantied to the Indians, during the pleasure of the President of the United States." The State argues that this privilege was "terminated" or "extinguished" by the 1850 order. *E.g.* St. Br. 16, 29. In Parts II and III below we show, as the lower courts held, that the 1850 order was unlawful. We begin, however, with the district court's conclusion that the 1850 order was ineffective because it was abandoned by the President soon after it was issued, a conclusion that reflects the longstanding position of the Executive Branch. PA 321.

A. President Taylor Had No Authority to "Terminate" the Privilege.

The State's argument is premised on its assertion that the 1850 order "terminated" or "extinguished" the privilege. However, as a threshold matter, the State fails to show that the 1837 treaty authorized President Taylor to do so. By establishing a privilege that is guaranteed "*during* the pleasure of the President," the treaty conferred power on the President to determine *when*, during his or her term of office, the privilege could

be exercised.[64] It did not authorize any president to terminate or extinguish the privilege for all time, thereby depriving his or her successors of the power expressly conferred by the treaty. This conclusion rests on the plain language of the treaty, the applicable canons of construction and the parties' practical construction of the treaty. *See Air France v. Saks*, 470 U.S. 392, 396-97 (1985); *Fishing Vessel*, 443 U.S. at 675-76.

The State's own analysis of the treaty language shows that the President had no power to "terminate" the privilege for all time. It contends (Br. 17) that "the ordinary meaning of the phrase 'during the pleasure of' in legal documents such as treaties is that the designated person or entity has the sole discretion to decide to take *the contemplated action*." (Emphasis added.) Here, the contemplated action is determining *when* the privilege of hunting, fishing and gathering should be guaranteed to the Chippewa. The power to determine when the privilege should be guaranteed to and exercised by the Chippewa does not encompass the power to terminate the privilege for all time, regardless of the pleasure of future presidents.[65] The treaty simply does not say, as the State's argument assumes, that the privilege is guaranteed "until it is terminated by the President."[66]

Although the State cites (Br. 21-22 n.8) other treaties using the phrase "during the pleasure of the President," they do not support its position.

64. Even this power must be exercised consistently with the President's fiduciary obligations to his Indian wards, and in a manner that is consistent with the intentions of the parties to the treaty. *See* Part III below.

65. If a sitting president could determine that the privilege should, henceforth, *never* be guaranteed, he could, conversely, determine that it should *always* be guaranteed. Neither is consistent with the plain language of the treaty.

66. An 1833 Pawnee treaty cited by the State (Br. 21-22 n.8) illustrates this point. It provides that

> [t]he land ceded and relinquished hereby, *so far as the same is not and shall not be assigned to any tribe or tribes*, shall remain a common hunting ground, during the pleasure of the President, for the Pawnees and other friendly Indians, who shall be permitted by the President to hunt on the same.

7 Stat. 448 (Art. II) (emphasis added). Under this provision, the President's authority to retain the common hunting ground and permit the Pawnees or others to hunt on it is continuing until the land is "assigned to" another tribe. *See Pawnee Indian Tribe of Oklahoma v. United States*, 109 F. Supp. 860, 883-84 (Ct. Cl. 1953). The 1837 treaty contains no such termination provision.

For example, an 1856 treaty provided that the Creeks would receive "[$2,000] per annum, during the pleasure of the President, for assistance in agricultural operations." 11 Stat. 699 (Art. 5). This provision cannot reasonably be read to mean that, if a sitting president stops agricultural assistance to the Creeks, neither he nor his successors can resume such assistance thereafter. Yet that is precisely the interpretation on which the State's "termination" argument rests. As this and other examples illustrate, this interpretation conflicts with the plain language of the treaty and would produce anomalous results.[67]

If the language of the 1837 treaty leaves any room to doubt that it created a continuing privilege that could *not* be terminated by a sitting president, that doubt should be resolved in favor of the Chippewa. Treaties with Indian tribes "are to be liberally construed" in favor of the Indians, and "[d]oubtful expressions are to be resolved in [their] favor." *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). These "principle[s are] deeply rooted in this Court's Indian jurisprudence," *Yakima County v. Yakima Indian Nation*, 502 U.S. 251, 269 (1992), and counsel against the implication of a power to terminate the privilege for all time that is at odds with the plain language of the treaty. Such an interpretation would also be inconsistent with the Court's traditional approach to Federal authority over Indian affairs, which has sought to *preserve* such authority absent explicit language to the contrary. *See Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655-56 (1976) (Court has protected Congress' power to alter statutory allotment plans until they are carried out, in the absence of a clear expression to the contrary).

The State's position is also inconsistent with the practical construction of the 1837 treaty by the parties to it. Very soon after the

67. The 1858 Yankton Sioux treaty cited by the State provides that a sum determined by the President can be taken from the tribe's annuities "and applied annually, during the pleasure of the President to the support of [tribal] schools." 11 Stat. 743 (Art. 4th). Under the State's approach, a sitting President who became dissatisfied with the operation of the schools and stopped applying annuity funds for their support would prevent future presidents from re-assessing the situation and restoring the funding authorized by the treaty. In an 1862 Ottawa treaty cited by the State, the Indian Department is to appoint an interpreter for the tribe "to be continued during the pleasure of the Secretary of the Interior." 12 Stat. 1237 (Art. 11). If the State were right, one Secretary could not only withdraw the interpreter but also bar his or her successors from reinstating the interpreter thereafter.

issuance of the 1850 order it was clear that it was a serious mistake — that it was unnecessary to serve the interests of the United States and would be disastrous to the Indians. Under the State's theory, the President had no power to change course, no matter what the consequences. However, at the urging of the Chippewa and others, the President and his subordinates in the 1850s plainly rejected that position, and instead suspended implementation of the order to permit a *new* determination by the President, and then abandoned the order altogether. *See* pp. 14-15 above. This "post-ratification conduct of the contracting parties" further undermines the State's position. *Zicherman v. Korean Air Lines*, 516 U.S. 217, 227 (1996).[68]

In short, given the plain language of the treaty, the applicable rules of construction, and the parties' practical construction, the 1837 treaty established a continuing privilege that could not be terminated by a sitting president. Thus, notwithstanding the 1850 order, the President retained authority under the 1837 treaty to guarantee the privilege during his pleasure.[69] Because it was the President's pleasure to do so almost

68. It should not escape notice that it is the State, a stranger to the treaty, that is urging an interpretation that is hostile to the interests of *both* contracting parties — to the Chippewa, by permitting the termination of their privilege for all time, even under circumstances where all concerned quickly recognized it had been a mistake to do so; and to the United States, by restricting the authority to continue the privilege for the benefit of its Indian wards.

69. At a minimum, it is clear that the President retained such authority until the 1850 order was carried out, and the Indians were settled on new lands where they could sustain themselves. This Court has long recognized that, in the context of Indian removals, the Indians retain their pre-existing rights, and the United States retains the authority to protect those rights, until the Indians are actually removed. *See Fellows v. Denniston*, 72 U.S. (5 Wall.) 761, 770 (1867) ("[u]ntil the Indians have sold their lands, and removed from them in pursuance of the treaty stipulations, they are to be regarded as still in their ancient possessions, and are in under their original rights, and entitled to the undisturbed enjoyment of them"); *People v. Dibble*, 62 U.S. (21 How.) 366, 371 (1859) (where treaty makes no provision "as to the mode or manner" in which the Indians are to be removed, they remain under the exclusive authority and guardianship of the Federal Government until they are actually removed); *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366, 372 (1857) (same); *see also United States v. Kagama*, 118 U.S. 375, 394 (1886).

Thus, in holding that the 1850 order was repealed, PA 321, the district

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immediately after the 1850 order was issued, and it remains the President's pleasure to do so today, the privilege is enforceable under the plain language of the treaty.

B. The Record Shows that, Shortly After the 1850 Order Was Issued, It Was the Pleasure of the President that the Privilege Be Guaranteed to the Chippewa, and It Remains the President's Pleasure Today.

The State's attempt to treat the 1850 order as the final and binding expression of the President's pleasure under the 1837 treaty cannot be squared with the record in this case.[70] Its contention (Br. 27) that "there was no evidence that the *President* ever revoked or modified, or even considered revoking or modifying, his [1850] order" (emphasis in original), is wrong as a matter of law and fact. This Court held in 1839 that the "President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 513 (1839). This is particularly true in the area of Indian affairs, where there has been a statutory delegation of authority to the Commissioner of Indian Affairs to "have the management of all Indian affairs and of all matters arising out of Indian relations" since 1832. Act of July 9, 1832, codified as amended, 25 U.S.C. § 2; *see Morton v. Ruiz*, 415 U.S. 199, 231-32 (1974) (under 25 U.S.C. §§ 2, 9 Executive authority "has been given explicitly to the Secretary and his delegates at the BIA"); 5 U.S. Op. Atty. Gen'l, 36, 39 (1848) (under 1832 Act Secretarial order "is to be presumed to

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court recognized that the 1850 order did not "terminate" or "extinguish" the privilege for all time. Indeed, the State itself has never denied that the President had the *power* to repeal the 1850 order. Thus, it too has recognized that the order did not bar either President Taylor or his successors from guaranteeing the privilege after the order was issued.

70. The district court found that the purported revocation of hunting and fishing rights in 1850 was never enforced against the Chippewa, and that the Executive Branch intended to repeal the order in its entirety. PA 320-21. The court of appeals agreed that the revocation of usufructuary rights was never implemented and that the order was replaced by new treaties that neither required the Chippewa to remove nor extinguished their hunting and fishing rights. PA 30 n.24. As set forth in the Statement of Facts, and summarized here, these findings rested on a substantial evidentiary record.

have received the assent of the President, *and to be his regulation*") (emphasis added).[71]

Accordingly, the acts of the Secretary of the Interior and the Commissioner of Indian Affairs, in suspending removal operations and resuming annuity payments to assist the Chippewa in hunting and fishing in the ceded territory, *see* pp. 14-17 above, must be presumed to have had the assent of the President and to have been his acts. Moreover, the 1854 and 1855 treaties, which set aside permanent homes for the Chippewa in the territories from which they had been ordered to remove, and which were intended to "reserve . . . rights . . . secured by former treaties," were submitted to the Senate and proclaimed by the President. *See* pp. 17-19 above. These treaties were, as the district court found, "completely contrary to the 1850 order." PA 321. Thus, not only was the 1850 order abandoned *by the President*, it was repealed by subsequent *treaties* of the United States. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *State v. Gurnoe*, 53 Wis. 2d 390, 400-01, 192 N.W. 2d 892, 899-900 (Wis. 1972) (1854 treaty repealed 1850 order).

The State also argues (Br. 27) that "there was no evidence that any federal official recommended reversal of the portion of the order revoking the hunting, fishing and gathering privilege; all the discussion concerned the removal portion of the order." This argument fails for several reasons. First, the district court found that "the *only* reason that the 1850 executive order included language extinguishing the hunting, fishing, and gathering privilege was to facilitate removal," and that the "*essential purpose* of the 1850 executive order was to remove the Chippewa." PA 310-11 (emphasis added).[72] Thus, the reversal of the removal directive is by

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71. *See also United States v. Midwest Oil Co.*, 236 U.S. 459, 469 (1915) (acts of subordinate Executive Branch officials must be treated as "act[s] of the President"); *Wolsey v. Chapman*, 101 U.S. 755, 769 (1880) (acts of heads of departments, within scope of their powers, are in law acts of the President); 7 U.S. Op. Atty. Gen'l 453, 482 (1855) ("as a general rule, the direction of the President is to be *presumed* in all instruction and orders issuing from the competent Department") (emphasis added).

72. The State *embraces* the proposition that "the overall purpose of the order was removal" in its severability argument. St. Br. at 25. Although it and the Landowners speculate about possible reasons why the President might have revoked the privilege even if he did not intend to remove the Chippewa, they do not identify a single document in the historical record that suggested this be done. As we discuss below, *see* note 79, such speculation fails to show that the district court's finding, based on a substantial evidentiary record, was clearly erroneous.

itself strong evidence that the President intended to permit the Chippewa to exercise their hunting and fishing rights in the ceded territory, and any ambiguity on this score should be resolved in favor of the Chippewa. *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444-45 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989) (isolated portions of prior act limiting Indian rights do not survive later act that stripped away entire context in which they appeared).

Second, as the district court found (PA 320-21), there was substantial additional evidence that the Chippewa retained their hunting and fishing rights under the 1837 treaty. The abandonment of the 1850 order was not some arbitrary or unintentional action, but an expression of the fiduciary obligations that the United States undertook as guardian to a dependent people when by treaty it acquired title to the Chippewa's lands and their allegiance to the United States. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). When the United States abandoned the 1850 order it did so precisely because removing the Chippewa from their traditional hunting and fishing territories would lead to large scale suffering and death; as one government official put it: "Let five thousand Indians be crowded into the small Territory they call their own, and they will subsist as long as they are fed by [the] Government, after which, they would starve or flee back to their own haunts." PA 254, quoting 3-26-1850 Livermore to Ramsey (JA 171). It cannot be supposed that, in allowing the Chippewa to remain, the United States did not preserve the treaty rights that protected their means of subsistence.

That it was the President's pleasure that the Chippewa exercise those rights was shown *inter alia* by the affirmative assistance the Government provided to the Chippewa to hunt and fish on ceded lands, the establishment of treaty reservations at locations that would provide access to off-reservation resources, the assurances provided by the U.S. treaty commissioner in 1854 that the Chippewa could leave their reservations *whenever* they desired for hunting purposes, the establishment of a new off-reservation hunting and fishing right in Minnesota in the 1854 treaty, and the explicit statements of Governor Gorman and others in 1855 that the Chippewa retained their hunting and fishing privilege under the 1837 treaty — statements that were not questioned by the Commissioner of Indian Affairs, the Secretary of the Interior, or anyone else. *See* pp. 19-20 above. Because these officials were involved in the implementation of the 1837 treaty and 1850 order, their views regarding the effect of the order are entitled to great weight. *See, e.g., Udall v. Tallman*, 380 U.S.

1, 16-17 (1965). Indeed, as the district court found, Governor Gorman's statement was "compelling contemporaneous evidence that [the 1837 privileges] were not revoked by the 1850 executive order." PA 270.

The State does not discuss *any* of this evidence, but its silence regarding the 1854 treaty and Governor Gorman's statements is particularly telling. The former shows that it was the President's pleasure to permit the Chippewa to continue to hold and exercise off-reservation hunting and fishing rights in Minnesota, and the latter shows that the Chippewa retained hunting and fishing rights under the 1837 treaty in particular. Thus, the record shows clearly that shortly after the 1850 order was issued, it was the pleasure of the President to permit the Chippewa to exercise their 1837 treaty privilege.

Finally, there can be no dispute that it remains the pleasure of the President that the privilege should be guaranteed to the Chippewa today. The order was not mentioned for 75 years after the 1854 and 1855 treaties were made, during a period in which the Chippewa, under claim of right, exercised their rights throughout the ceded territory, notwithstanding State attempts to confine them to their reservations and enforce restrictive fish and game laws. *See* pp. 20-21 above. Although the order was rediscovered in the 1930s and 1940s, that period has been followed by 50 years in which the United States, on the basis of careful analysis of the historical circumstances, has denied that the order was ever effective, sued to enforce the 1837 privilege, and promulgated regulations to implement the privilege. *See* pp. 21-22 above. Over the last 15 years Congress has held hearings growing out of the exercise of the privilege, has rejected bills to abrogate the treaty, and instead has helped fund implementation of the Chippewa's rights. *See* pp. 22-23 above. The President's manifest pleasure to enforce the 1837 privilege, with the acquiescence and support of the Congress, should be given effect under the plain language of the treaty.[73]

II. THE 1850 ORDER WAS UNLAWFUL.

The State's reliance on the 1850 order fails for a second reason. As the court of appeals held, and the State does not dispute, the President

73. *See Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (long-continued practice, known to and acquiesced in by Congress, raises presumption of congressional consent); *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 515, 517 (1994) (deference owed to current position of Executive Branch).

had no authority to remove the Chippewa from the 1837 ceded territory. The State's attempt to sever the order, whose sole purpose was removal, is without merit.

A. The Directive to Remove Was Unlawful.

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court held that the "President's power, if any, to issue [an executive] order must stem either from an act of Congress or from the Constitution." *Id.* at 585. In finding President Truman's order seizing the nation's steel mills invalid the Court particularly noted that two statutes authorized the President to seize property under certain conditions, but "these conditions were not met." *Id.* at 585-86; *see id.* at 602 (President could not act in disregard of statutory limitations on seizure) (Frankfurter, J., concurring). The Court also held an executive order invalid in *Cole v. Young*, 351 U.S. 536, 557 (1956), reasoning that when the President rests his action on statutory authority, "the validity of the action must be determined solely by the congressional limitations which the President sought to respect." *Id.* at 557 n.20. In *Dames & Moore*, the Court upheld presidential orders, but reiterated that "when the President acts in contravention of the will of Congress, 'his power is at its lowest ebb,' and the Court can sustain his actions 'only by disabling the Congress from acting upon the subject.' " 453 U.S. at 669, quoting *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring).[74]

Congress addressed Indian removal in the 1830 Removal Act, but conferred no authority on the President to order the removal of tribes without their consent. Instead, it authorized the President to take measures to *induce* the tribes to remove, and permitted him to set apart lands for those tribes "as may choose" to do so. JA 21.[75] The requirement of tribal

74. For additional cases addressing the validity of executive orders, *see, e.g., Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332-39, *reh'g denied*, 83 F.3d 439 & 442 (D.C. Cir. 1996); *Matter of Reyes*, 910 F.2d 611, 613 (9th Cir. 1990); *Levy v. Urbach*, 651 F.2d 1278, 1282 (9th Cir. 1981); *National Federation of Employees, Local 1622 v. Brown*, 645 F.2d 1017, 1025 (D.C. Cir. 1981) (Ginsburg, J.); *Day v. United States*, 611 F.2d 1122 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980).

75. Supporters of the Act emphasized that it gave the President no authority to remove the Indians without their consent. *See* 6 Gales & Seaton's Register of Debates in Congress 359 (Apr. 20, 1830) (authority contemplated by the bill extends only to those Indians willing to remove; "[t]he friends of

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consent was recognized by President Andrew Jackson, a vigorous removal advocate. PA 24-25. Congress subsequently recognized the need for tribal consent by appropriating funds to negotiate treaties providing "for [the tribes'] removal." PA 25. In the 1842 and 1847 Chippewa treaties, the Commissioner of Indian Affairs recognized that, even in a land cession treaty, a specific removal provision was necessary to provide authority to remove the Indians. *See* pp. 8-9 above.

The courts have held consistently that Indians cannot lawfully be removed, even from ceded lands, unless the removal is authorized by an act of Congress or a treaty. In *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 355-56 (1941), the Court held that, notwithstanding appropriations to assist in removal, an attempt to remove Indians without their consent was "not pursuant to any mandate of Congress," and therefore "unauthorized" and of no legal effect. In *United States v. Crook*, 25 F. Cas. 695 (D. Neb. 1879), Judge Dundy held that, notwithstanding appropriations to aid in the removal of Ponca Indians, whose lands had been *ceded* to the United States, "without some specific authority found in an act of Congress, or in a treaty with the Ponca tribe of Indians," there was simply no authority for their removal. *Id.* at 700; *see Elk v. Wilkins*, 112 U.S. 94, 108-09 (1884) (referring to Judge Dundy as "that learned judge," and explaining that his holding rested on the absence of "lawful authority" for removal).[76]

There is no provision authorizing the removal of the Chippewa from the 1837 ceded territory in any act of Congress or treaty. PA 26-27. When President Taylor ordered the Chippewa to remove in 1850, without first obtaining their consent, he acted without "lawful authority" and "in contravention of the will of Congress." Under this Court's precedents,

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this measure do not wish to vest power in the President . . . by strong arm, to drive these unfortunate people from their present abode"); *id.* at 328 (Apr. 15, 1830) (proposed change "not intended to be forced upon [the Indians], but to be the result of their own judgment"); 360 (Apr. 20, 1830) (bill "is only to operate upon those Indians who are willing to remove").

76. *See also Fellows v. Denniston*, 72 U.S. (5 Wall.) at 770 (Indians cannot be disturbed until they "have sold their lands, *and removed from them in pursuance of treaty stipulations*") (emphasis added); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 752 (1867) (policy implemented by the 1830 Removal Act was "to *persuade* all the Indian tribes east of the Mississippi to migrate and settle . . . west of that river") (emphasis added).

his order was unlawful and ineffective, the district court and court of appeals so held, and the State does not challenge that holding here.

B. The Revocation of Hunting and Fishing Rights Cannot Be Severed from the Order to Remove.

To circumvent the unlawfulness of the removal order, the State relies (Br. 23-26) on the rule of statutory construction that a court should invalidate no more of a statute than necessary. *See Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987). Under the traditional test for severability, the invalid part of a statute may be dropped if what is left is fully operative as a law, " '[u]nless it is evident that the Legislature would not have enacted [the remaining] provisions . . . independently . . . .' " *Id.*, quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam); *Champlin Refining Co. v. Corp. Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932). The district court applied this test, but concluded that the "President *would not have* issued an executive order merely to extinguish the usufructuary rights guaranteed under the 1837 treaty." PA 309-12 (emphasis added). Applying the same test the court of appeals affirmed, finding that "[t]he purpose of the Order was to mandate removal, and this purpose was integral to the entire Order." PA 27-31. Although the court considered *sua sponte* the possibility that the President would have issued a revocation order to "encourage" the Chippewa to remove, it found no evidence to support such a scenario in the record. PA 29-31.

The State's principal argument for severing the 1850 order (Br. 24-25) seizes on this rejected hypothesis.[77] Although it did not make the

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77. In support of this argument, the State notes that the court of appeals described its task as determining "whether President Taylor *would have* issued an executive order revoking the Bands' treaty rights without also ordering removal," and claims that the form of this question reversed the "presumption" of severability. St. Br. at 24, quoting PA 29 (emphasis added by the State). This claim lacks substance.

First, notwithstanding any such presumption, "[w]hether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent." *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality op.). Accordingly, in the absence of a severability clause, the Court has employed traditional tools of statutory construction to determine whether "*Congress would have enacted*" the statute without the offending provision, *Alaska Airlines*, 480 U.S. at 686-87, 691 (emphasis added), which is precisely the question asked by the court of appeals here. *See also United States v. Treasury Employees*, 513 U.S. 454, 488 (1995)
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argument below, *see* PA 29, the State now embraces the proposition that "the overall purpose of the order was removal" and contends that, had he known he could not order removal directly, President Taylor would have revoked the bands' usufructuary privileges to "encourage" removal. However, while it is clear that the drafters of the 1850 order believed that revocation of usufructuary privileges was a necessary component of the removal order, there is no evidence that they believed it was sufficient, *by itself*, to accomplish the goal of removal. Notably, elsewhere in its brief the State concedes (Br. 47 n.21) that a revocation of the Chippewa's usufructuary privilege would not have meant that "the Indians could not hunt and fish" in the ceded territory, but only "that such activity must be done pursuant to territorial and, later, state law." *See Winans*, 198 U.S. at 380 (in absence of treaty fishing right, Indians would have had same right to fish as would "any inhabitant of the territory or state"). The State does not explain how, under these circumstances, a revocation of the usufructuary privilege would — by itself — have encouraged the Chippewa to remove.

Moreover, even if the Government lawfully could have stopped the Chippewa from hunting and fishing by revoking the 1837 privilege, there is a material difference between an order that revokes usufructuary privileges as a predicate to a *lawful* removal directive and one that, in the absence of removal authority, revokes usufructuary privileges in order to force the Chippewa to remove by depriving them of the means of subsistence. As the court of appeals noted, and the State does not dispute, there is "in the record no statement by anyone indicating [the latter] plan had ever been considered, much less employed." PA 30. In fact, the record shows that such an order would *not* have been issued. During the effort

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(O'Connor, J., concurring and dissenting) (under *Alaska Airlines*, "the operative question . . . is whether *Congress would have promulgated*" a statutory provision if it had known certain applications of the provision were unconstitutional) (emphasis added).

Second, "the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Because the Court requires explicit language to abrogate treaty rights, *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985), and interprets ambiguous provisions to benefit the tribes, *Montana*, 471 U.S. at 766, if there is any doubt about whether to sever the 1850 order it should be resolved in favor of the Chippewa.

to implement the removal order the Executive Branch took no steps to stop the Chippewa from hunting, fishing and gathering in the ceded territory, either to "encourage" them to remove or for any other purpose. To the contrary, it delayed removal efforts to accommodate hunting and gathering activities and, in 1853 and 1854 provided annuity goods to assist the Chippewa in those endeavors. *See* pp. 12-13 & n.27, 15-16 above. Severance is improper where the record shows that the Government rejected the very approach that would allegedly result from severing the order. *See Alaska Airlines*, 480 U.S. at 685 (severance improper if remainder of statute would not operate "in a *manner* consistent with the intent of Congress") (emphasis in original); *Bowsher v. Synar*, 478 U.S. 714, 735 (1986) (severance improper where it "would lead to a statute that Congress would probably have refused to adopt"). In addition, if the State is correct that the Chippewa's usufructuary rights were revoked to "encourage" them to remove, that provision was repealed when the President determined and the 1854 and 1855 treaties provided that the Chippewa did not have to remove, but could remain permanently in the ceded territory. *See Radzanower*, 426 U.S. at 154.

The State also argues (Br. 25) that President Taylor would have revoked the Chippewa's usufructuary rights for purposes other than removal. However, this argument conflicts directly with the district court's finding, affirmed on appeal, that "the *only* reason that the 1850 executive order included language extinguishing the hunting, fishing, and gathering privilege was to facilitate removal of the Chippewa. . . ." PA 310 (emphasis added); *see* PA 29-30. The only evidence cited by the State in support of this argument is Governor Ramsey's speech to the Territorial Legislature and the Legislature's Joint Resolutions to Congress. *See* JA 878; PA 567; pp. 9-10 above. However, both Governor Ramsey and the Legislature closely linked the revocation of hunting and fishing privileges with the removal of the Chippewa; neither they (nor anyone else) sought to end the hunting and fishing privilege while the Chippewa remained in the ceded territory. *See* pp. 9-10 above. Moreover, the asserted basis for stopping the privilege and removing the Chippewa — to "ensure the security and tranquility of white settlements" — would not have been furthered if the privilege ceased but the Chippewa remained in the ceded territory.[78] And, the title of the resolutions confirms that their purpose

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78. The objective revealed in the correspondence between Governor Ramsey and Henry Rice — bringing economic and political benefits to

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was removal: "Joint Resolutions *relative to the removal of the Chippewa* from the ceded lands within the Territory of Minnesota." PA 566-67 (emphasis added).

There was substantial additional evidence to support the district court's finding, which the State does not address at all. For example, on the day it was issued, Commissioner Brown stated the "policy" of the order was announced in his 1849 annual report, which asserted that the "longer *residence* [of the Chippewa on the ceded lands] is incompatible with the tranquility and interests of our citizens," but suggested no reason for revoking hunting and fishing rights if the Chippewa were to remain. PA 253 (emphasis added); *see* PA 310, p. 12 above. On receipt of the order, Governor Ramsey referred to it as an "order for removal," and in all of his efforts to implement the order he treated it as such. *See* pp. 12-13, 15 above. And, despite the extensive documentation surrounding the issuance, implementation and abandonment of the order, there is not a single document in the historical record in which anyone suggested any reason for revoking the Chippewa's usufructuary rights in the absence of their removal from the ceded territory. Thus, the district court and the court of appeals were entirely correct in finding that "[t]he purpose of the Order was to mandate removal, and this purpose was integral to the entire Order." PA 29.[79] On this record, the lower courts properly held that the unlawful 1850 order could not be severed.

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Minnesota — was likewise dependent on the removal of the Chippewa, and would have been undermined if the privilege were suspended but the Chippewa were not removed. PA 310; *see* p. 11 & n.24 above.

79. The State and Landowners suggest three reasons why the President might have revoked the Chippewa's usufructuary rights even if he did not intend to remove them: (1) to extinguish the rights of Chippewa bands not residing in the ceded territory (St. Br. 26 n.10); (2) to clear land title to make way for survey and sale (Ld. Br. 27); and (3) to resolve the conflict between the privilege and state regulatory authority (Ld. Br. 25). Only one of these reasons (clearing land titles) was suggested in the district court, which rejected it because the evidence showed that it was unnecessary to revoke the privilege to permit the survey and sale of lands: lands had already been surveyed and sold in the 1837 ceded territory when the order was issued; and the Government extended a similar privilege to the 1854 ceded territory, and lands were surveyed and sold there without extinguishing the privilege. PA 311.

The other suggested reasons fare no better. There was no evidence that anyone intended to extinguish the privilege of non-resident bands in the

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III. EVEN IF SEVERABLE, THE PORTION OF THE 1850 ORDER PURPORTING TO REVOKE THE 1837 PRIVILEGE WAS INVALID.

The State's reliance on the 1850 order fails for a third reason. Even if severable, the portion of the order purporting to revoke the 1837 privilege was itself invalid.

A. The President Did Not Have *Unfettered* Discretion to Revoke the Privilege.

1. The State argues (Br. 16-23) that, because the language of the treaty confers "sole discretion" on the President over the usufructuary privilege, it must be read to permit termination of the privilege at *any* time and for *any* reason. However, the State's argument overlooks fundamental principles of contract and treaty law that govern the construction of a clause giving authority to one of the contracting parties, and ignores the United States' fiduciary responsibilities to Indian tribes.

A treaty is in essence a contract between sovereign nations, and is subject to the rules of construction that apply to the interpretation of contracts. *Societe Nat. Ind. Aero. v. U.S. District Court*, 482 U.S. 522, 533 (1987); *Fishing Vessel*, 443 U.S. at 675; *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902).[80] In *Tymshare v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984) (Scalia, J.), the court interpreted a contract which "state[d] and reiterate[d]" that an employer could change a sales quota plan "within [its] *sole discretion.*" 727 F.2d

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absence of removal of resident bands, and the State suggests no policy objective that would have been served by such an order. Nor is there any evidence of an intent to address a conflict between the privilege and state regulatory authority or, indeed, any evidence that such a conflict existed at the time. This theory is inconsistent with the 1842 treaty, which established a hunting right in the *State* of Michigan, the 1854 treaty, which extended hunting and fishing privileges to the lands ceded in that treaty, and the 1854-55 Stevens treaties, which secured similar off-reservation rights in the Pacific Northwest. *See Fishing Vessel*, 443 U.S. at 661-62 & n.2 (1979).

80. If anything, treaties " 'are construed more liberally than private agreements, and to ascertain their meaning [a court] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.' " *Air France v. Saks*, 470 U.S. at 396, quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943).

at 1154 (emphasis added). The court held that this express provision did not confer authority on the employer to alter the plan "for any reason whatsoever." *Id.* This result rested on the doctrine that the parties to a contract must perform in good faith, which is a "fundamental principle[ ] of contract law" that obligates the contracting parties "not to engage in the particular form of conduct which, in the case at hand, constitutes 'bad faith.' " *Id.* at 1152.[81] The doctrine applies with even greater force to treaties. *Sullivan,* 254 U.S. at 439 (treaties "are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties"); *Tucker,* 183 U.S. at 437 (treaties " 'are to receive a fair and liberal interpretation according to the intentions of the contracting parties, and to be kept with the most scrupulous good faith' ").

Of course, it is possible to draft a treaty or contract to leave decisions absolutely to the uncontrolled discretion of one party. *Tymshare*, 727 F.2d at 1153. "But the trick is to tell *when* a contract has been so drawn — and *surely the mere recitation of an express power is not always the test.*" *Id.* (emphasis added). The answer is found in the "nature of the power at issue" and the intentions of the contracting parties:

> Where what is at issue is the retroactive reduction or elimination of a central compensatory element of the contract — a large part of the *quid pro quo* that induced one party's consent — it is simply not likely that the parties had in mind a power quite as absolute as [the employer] suggests. . . . *[T]he language [in the contract] need not (and therefore can not reasonably) be read to confer discretion to reduce the quota for any reason whatever* — including what Covell has alleged here, a simple desire to deprive an employee of the fairly agreed benefit of his labors.

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81. These principles have their origin in the writings of Cicero, *see* 3A *Corbin on Contracts* § 654A (Supp. 1992), and were well-established in English and American common law in the 19th century. In a series of cases, the courts held that contract provisions conferring authority on one party did not confer *unfettered discretion*, and imposed limitations to ensure that such authority was exercised consistently with the intentions of the contracting parties. *E.g. Singerly v. Thayer,* 108 Pa. 291, 2 A. 230, 233 (1885); *Frolick v. Schonwald,* 52 N.C. 330, 331 (1860); *Bryant v. Flight,* 5 M & W 114, 117, 151 Eng. Rep. 49 (1839); *Jewry v. Busk,* 5 Taunt. 302, 128 Eng. Rep. 706 (1814). *See* Chitty, *The Law of Contracts* 544 (6th American Ed. J.C. Perkins 1844).

Id. at 1154 (emphasis added). *Accord: Market Street Associates v. Frey*, 941 F.2d 588, 594-96 (7th Cir. 1991) (Posner, J.).

These principles have "special meaning" in interpreting an Indian treaty, because "[t]he United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side." *Fishing Vessel*, 443 U.S. at 675-76. An Indian treaty is to be construed "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Id.*, quoting *Jones v. Meehan*, 175 U.S. 1, 10-11 (1899); *accord, Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832) (McLean, J., concurring). And, as explained above, ambiguities must be resolved in favor of the Indians, for "it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government. . . ." *Winters v. United States*, 207 U.S. 564, 577 (1908); *accord*, *McClanahan v. Arizona State Tax Comm.*, 411 U.S. 164, 175 (1973); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918).

2. Like the contract in *Tymshare*, the language of the 1837 treaty "need not, and therefore can not reasonably," be read to confer authority on the President to revoke the usufructuary privilege at any time and for any reason. Indeed, as discussed in Part I above, the language of the treaty, which "guarantee[s]" the privilege "during the pleasure of the President," confers no power on the President to permanently revoke the privilege. But even if such power existed, it could not be exercised in a manner that would not have been countenanced by the parties at the time the treaty was made.

That the treaty was not intended — by either party — to permit the President to revoke the Chippewa's usufructuary privilege at any time and for any reason is clear from the record. First, such an interpretation would mean that the President could have revoked the privilege the day after the treaty was ratified, something not in the contemplation of either party. The primary purpose for which the Government acquired the lands (lumbering) was compatible with (and in part depended upon) continued Chippewa hunting, fishing and gathering. *See* pp. 4-5 & n.23 above. The Government made no provision for the Chippewa's removal in the treaty.

Thus, both parties contemplated that the Chippewa would remain and exercise their privilege for many years: the Chippewa anticipated being present for at least another 60 years, and Governor Dodge assured them that it would "probably be many years, before your Great Father will want all these lands for the use of his white Children." JA 78; *see* p. 6 above.

Second, and more important, the Chippewa emphasized throughout the treaty negotiations that hunting, fishing and gathering were essential to their survival and way of life; even the State's anthropologist testified that preserving the ability to live off the land was of "paramount importance" to the Chippewa in the treaty negotiations. PA 231; *see* pp. 5-7 & n.8 above. Governor Dodge readily agreed that they would have the privilege of hunting and fishing in the ceded territory "during the pleasure of the President," and repeatedly assured the Chippewa that they would be treated justly by the President and his agents. *See* pp. 5-7& n.10 above.[82] This Court's observation about the treaty negotiations in the Pacific Northwest is apropos here; it is

> perfectly clear . . . that the Indians were vitally interested in protecting their right to take fish . . . and that they were invited by the white negotiators to rely and did in fact rely heavily on the good faith of the Untied States to protect that right.

Fishing Vessel, 443 U.S. at 667. To construe the treaty to give the President *unfettered* discretion to revoke the privilege at any time and for any reason is inconsistent both with the overriding importance of the privilege to the Chippewa and Governor Dodge's repeated assurances of just treatment. PA 236-37, 314.

Third, the "sense in which [Article 5] would naturally [have been] understood" by the Chippewa, *Fishing Vessel*, 443 U.S. at 675-76, would *not* have conferred unfettered discretion on the President.[83] Rev. Boutwell

82. Contrary to the State's suggestion (Br. 19), Governor Dodge never used the term "temporary" to characterize the privilege.

83. The State's argument (Br. 20) that Federal officials understood the treaty to confer unfettered discretion on the President is misplaced for two reasons. First, the State cites nothing in the record in which Federal officials suggested that the President could act for any reason (or no reason); as in *Tymshare*, their assertion of a power of revocation need not, and can not reasonably, be read as an assertion of a power to revoke the privilege for any

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wrote at the time that the Chippewa "knew nothing" of the duration of a man's pleasure. *See* p. 8 above. Instead, during the treaty council, Chippewa chief Ma-ghe-ga-bo stated "[i]f I have rightly understood you I can remain on the lands and hunt there." *See* p. 6 above. Had the Chippewa understood Dodge's response to mean that the President could revoke their rights at any time, they surely would have objected, as they vehemently objected when this possibility was raised in the 1842 treaty council. *See* p. 8 above. In 1842 the Government suggested that it might someday revoke the Chippewa's usufructuary rights in northern Wisconsin and Michigan and order them to remove from those lands. The Chippewa response was described in a contemporaneous account by a Lac Courte Oreilles chief:

> But I and my brother Chiefs refused to touch the pen, unless . . . we should be permitted to remain on the land as long as we behaved well and are peaceable with our grand father and his white children. . . . [W]hen I touched the pen it was on consideration that . . . we should remain on the land, as long as we are peaceable. We have no objection to the white man's working the mines, & the timber and making farms, but we reserve the birch bark & cedar, for canoes, the rice and the sugar tree and the priviledge [*sic*] of hunting, without being distu:bed by the whites.

1-6-1843 Brunson to Doty (JA 121-22); PA 242. The fact that the Chippewa did not object in 1837 is strong evidence that they understood, as Governor Dodge promised, that the President would treat them justly and, thus, protect their rights, not revoke them at a whim. PA 236-37.[84]

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reason whatever. Second, "it is the intention of the *parties*, not solely the superior side, that must control any attempt to interpret the treat[y]." *Fishing Vessel*, 443 U.S. at 675 (emphasis added). To prevent overreaching by the United States, the treaty must be construed, "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally [have been] understood by the Indians." *Id.* at 675-76.

84. The State argues (Br. 19) that "there was not an iota of evidence from the treaty negotiations that the Indians did not understand the meaning of 'during the pleasure of the President.' " But Rev. Boutwell was present during the negotiations, and his contemporaneous statement that the Chippewa

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3. The conclusion that the 1837 treaty did not confer unfettered discretion on the President is not only supported by applicable principles of contract and treaty interpretation, it is *compelled* by the Northwest Ordinance and the fiduciary obligations imposed by the federal trust responsibility, obligations recognized by this Court as early as 1831. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 17 (unique relationship of tribe to United States resembles that of ward to guardian). The Northwest Ordinance, 1 Stat. 51 (1787), required that "[t]he utmost good faith shall always be observed toward the Indians," PA 313, and under the federal trust responsibility:

> *In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. . . .* Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the *most exacting fiduciary standards.*

Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942) (footnote omitted; emphasis added); *see Tulee*, 315 U.S. at 684-85 (treaty fishing right should be construed "in a spirit which generously recognizes the full obligation of this nation to *protect the interests* of a dependent people") (emphasis added). Contrary to the State's argument (Br. 26-27), nothing in the 1837 treaty relieved the United States of the duty of good faith imposed by the Northwest Ordinance or its fiduciary obligations to its Indian wards; as the court held in *Tymshare* there is no inconsistency between a clause conferring power

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did not understand that phrase is uncontradicted in the record; indeed, his prediction that there would be trouble with the Chippewa should the Government attempt to remove them was prescient. *See* pp. 8, 13-14 above. The State also mischaracterizes the record when it complains (Br. 19) that the district court dismissed as speculative its assertion that "English speaking persons at the negotiations who were friendly to the Indians may have explained the treaty provisions to them." The State argued below that "traders, half-breeds, and missionaries" would have told the Chippewa that their privilege could be revoked at any time and for any reason. The district court rejected this argument not only because it was speculative, but because it was directly contradicted by Rev. Boutwell's letter and by evidence that traders and half-breeds stood to receive substantial payments under the treaty and therefore would have been unlikely to raise issues that would impede its successful conclusion. PA 315; JA 1081-83.

on one party to a contract and a duty to exercise that power in good faith, consistently with other legal obligations.

The State cannot seriously contend that it was the intention of the parties to the 1837 treaty to authorize the President to revoke the usufructuary privilege on a whim, for no reason at all, or in bad faith, notwithstanding the requirements of the Northwest Ordinance, his fiduciary obligations to the Indians, the importance the Chippewa placed on the usufructuary privilege throughout the treaty negotiations, and the Government's explicit promises of just treatment. Notably, the unlimited power for which the State contends here is not a power to terminate the treaty in its entirety, relieving both parties of its provisions. Rather, it is a power to revoke the one provision that was (and still is) of "paramount importance" to the Chippewa, while retaining the provisions that benefit the United States (most prominently, the cession of over 13 million acres of land). Given the fiduciary relationship between the parties, it is simply inconceivable that the Government, much less the Chippewa, intended to confer such unlimited power on the President in this context. *See Air France*, 470 U.S. at 397 (analysis begins with text of treaty "and the context in which the written words are used"); *Zicherman*, 516 U.S. at 223 (giving effect to "shared expectations of the contracting parties" in interpreting treaty).

The State ultimately contends (Br. 22-23) that any interpretation of the treaty that does not permit the President to terminate the Chippewa's usufructuary privilege in his unfettered discretion — at any time and for any reason — is contrary to the plain meaning of the treaty. However, as *Tymshare* teaches, the inclusion of a clause conferring authority on one party does not *ipso facto* confer *unfettered* authority on that party. Every court that has examined the validity of the 1850 order in light of the language and history of the 1837 treaty has concluded that the treaty did not confer unfettered discretion on the President.[85] These holdings are not inconsistent with the plain meaning of the treaty; rather they read the language of the treaty in light of well-established legal principles and give full effect to the intentions of the parties. In contrast, the State's interpretation, under which the President could revoke the usufructuary privilege at any time for any reason or no reason, makes Article 5

85. *See Lac Courte Oreilles*, 700 F.2d at 361-62; *Menominee Indian Tribe v. Thompson*, 943 F. Supp. 999, 1010 (W.D. Wis. 1996) (app. pending); *Mille Lacs II*, 861 F. Supp. at 826-27 (PA 314-16); *United States v. Bouchard*, 464 F. Supp. 1316, 1349-50 (W.D. Wis. 1978).

essentially meaningless — "an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more." *Winans*, 198 U.S. at 380.

B. The President Acted Outside the Scope of His Authority in Purporting to Revoke the 1837 Privilege in 1850.

The district court held that the President could revoke the usufructuary privilege only if the Chippewa misbehaved in a manner that interfered with white settlement, that in any event the President was required to act in good faith, and that the 1850 order was inconsistent with each of these obligations. PA 314-16. This Court should affirm because it is clear, at a minimum, that when President Taylor signed the 1850 order, he acted in a manner that *neither* party would have countenanced when the treaty was made and violated his fiduciary obligations to the Chippewa. Commissioners Lea and Manypenny, Minnesota Territorial Governor Ramsey, and Special Agent Gilbert all determined that the order was *not* necessary to serve the interests of the *citizens or Government* of the United States; that *local residents wanted the Chippewa to remain* on account of their good behavior, contributions to mineral and timber enterprises, and participation in the fish and fur trade; that the Chippewa were *not interfering with settlement*; and that the order would be *disastrous to the Chippewa*. *See* pp. 13, 14-17 above. Neither the President nor the Congress questioned these determinations; instead, they acted upon them in suspending the order, restoring annuity payments and then authorizing and approving the 1854 and 1855 treaties. *See* pp. 17-19 above.

The State cites nothing in the language or negotiating history of the treaty to suggest that either party contemplated that the Chippewa's usufructuary rights could be revoked under these circumstances. Governor Dodge's statement that it would be many years before the President would want "all the lands for the use of his white children" is inconsistent with the proposition that the Chippewa's privilege could be revoked when the lands were *not* needed for non-Indian settlement and those non-Indians that were present wanted the Chippewa to remain. His assurance that the President would treat the Chippewa justly is inconsistent with the proposition that their rights could be revoked as part of an unlawful removal effort that would be disastrous for the Chippewa, and that was requested by Minnesotans who hoped to profit at their expense. *See* pp. 10-11 above. And the Chippewa's own understanding that the President would protect their rights unless they

misbehaved by interfering with white settlers (which was derived from explicit promises of just treatment at the 1837 treaty council, expressly confirmed at the 1842 treaty council, and gave rise to their strenuous protests when the 1850 order was issued), is inconsistent with the proposition that the President could revoke the privilege when they remained peaceable and provided no impediment to settlement.[86]

The validity of the purported revocation of the 1837 usufructuary privilege in the 1850 order depends on the scope of authority conferred in the 1837 treaty. Because the language in the treaty "need not, and therefore can not reasonably," be read to confer authority on the President to revoke the privilege under the circumstances present in 1850, *Tymshare, supra*, the order was issued without lawful authority and was therefore invalid. *See Youngstown*, 343 U.S. at 585-86. Notably, this is not a case in which the Court needs to second guess the determinations of the Executive Branch on which the President's order rested; it is the Executive Branch's own determinations, upon which the President and the Congress based their future actions, which demonstrate the invalidity of the order.

The Counties (Br. 36) and Landowners (Br. 12) argue that, even if the President acted outside the scope of authority conferred by the treaty, his order is unreviewable under *Dalton v. Specter*, 511 U.S. 462 (1994).[87] There, however, the Court construed a statute that did not "*at all* limit the President's discretion," and instead allowed him to act "*for whatever reason* he sees fit." *Id.* at 476 (emphasis added); *see id.* at 478 (Souter, J., concurring) ("Act grants the President unfettered discretion" to act "for a good reason, a bad reason, or no reason"). For the reasons explained above, the 1837 treaty did not confer the kind of unfettered discretion on the President conferred by the statute at issue in *Dalton*. Where the

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86. The Counties argue (Br. 26-31) that the "record" before the President justified the revocation of the privilege in 1850. However, the Counties' description of the record is highly misleading, and ignores both the findings of the district court and Executive Branch at the time. *E.g.* PA 250-51. Notably, the Counties' suggestion that "cultural misunderstandings" justified the 1850 order is expressly contradicted by Governor Ramsey's statement that not even the "prejudices . . . of our citizens" necessitated the Chippewa's removal. *See* p. 15 above.

87. In this case, unlike *Dalton*, the Executive Branch contends that the order was ineffective. The Counties and Landowners do not explain why *Dalton* should apply to the President's 1850 order, as opposed to his position today.

governing law imposes limitations on the President's authority, the validity of his action depends on whether he has complied with those limitations. *E.g. Clinton v. Jones*, 520 U.S. 681, __ 137 L. Ed. 2d 945, 966 (1997); *Cole v. Young*, 351 U.S. at 557 n.20; *Wiener v. United States*, 357 U.S. 349, 356 (1958). To hold otherwise would render meaningless limitations on presidential authority imposed by Congress and upheld by this Court. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 411 (1989); *Morrison v. Olson*, 487 U.S. 654, 691-92 (1988); *Humphrey's Executor v. United States*, 295 U.S. 602, 631-32 (1935); *see generally Chamber of Commerce v. Reich*, 74 F.3d at 1329-32. If such limitations are to be effective, executive orders that exceed them, such as the 1850 order at issue here, cannot be enforced.

IV. NEITHER PAYMENT FOR CEDED LAND NOR THE STATE'S INTEREST IN SUPPRESSING CHIPPEWA HUNTING AND FISHING SUPPORTS THE STATE'S POSITION.

The State seeks to justify its position on the ground that the Chippewa received "adequate compensation" for the land ceded in the 1837 treaty. St. Br. 28-29.[88] However, the Chippewa were entitled to such compensation because they ceded the land; the United States acquired ownership of the land and has conveyed substantial portions of it to the State and its non-Indian citizens. The fact that the Chippewa were belatedly paid fair compensation for the land they ceded cannot justify disregarding the hunting and fishing privilege separately guaranteed in the treaty. No court has ever held that payment for a land cession justifies the judicial abrogation of an expressly reserved hunting and fishing right.[89]

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88. The Landowners go further, and argue that the Indian Claims Commission Act, 60 Stat. 1049, is a jurisdictional bar to this case. Ld. Br. 13-14. However, they point to nothing in that Act that bars the United States' claims, and the district court correctly held that the Act does not bar the Bands' claims. PA 394-96.

89. In *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 774 (1985), this Court held that the payment for lands ceded in a 1901 agreement, which contained no express reservation of hunting and fishing rights, supported its conclusion that the agreement did *not* reserve such rights; the Court did not suggest that payment for lands ceded in a treaty such as the 1837 Chippewa treaty, which expressly guaranteed such rights, would justify disregarding those rights. *See* PA 49-51. Other courts have held consistently that compensation for lands has no effect on hunting and fishing rights expressly reserved in land cession treaties. *E.g. United States v. Washington*, (Cont'd)

Nor can the State's position be justified by its desire to suppress Chippewa hunting and fishing practices. The standards developed by this Court and applied by many federal and state courts allow for the orderly implementation of the treaty privilege in a manner that protects the interests of the State as well as private property owners. *See* p. 2 & n.1 above. The workability of those standards is confirmed by the fact that the parties to the *Lac Courte Oreilles* litigation in Wisconsin have had no need to return to court in the seven years since final judgment was entered in that case; virtually every implementation issue in this case was resolved by stipulation among the United States, the State and the Chippewa bands; the State did not appeal a single implementation issue to the court of appeals; and the State conceded that natural resources will not be damaged "at all" by the decisions below. *See* pp. 2-3 & n.3 above. [90]

(Cont'd)
135 F.3d 618, 637 (9th Cir. 1998) (reaffirming *United States v. Washington*, 459 F. Supp. 1020, 1039-42 (W.D. Wash. 1978)); *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983); *Holcomb v. Confederated Tribes of the Umatilla Indian Reservation*, 382 F.2d 1013, 1014 (9th Cir. 1967); *cf. Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991), *cert. denied*, 506 U.S. 822 (1992) (distinguishing the 1837 Chippewa Treaty from a Shoshone treaty, which did not expressly reserve usufructuary rights).

90. These points are developed more fully in the briefs filed by respondents Bad River Band *et al.* and Fond du Lac Band *et al.* The State's current complaints (Br. 37-39) about the regulatory and management system to which it stipulated and about rulings it did not appeal should be viewed in light of this larger picture.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — CHIPPEWA LAND CESSIONS, 1837-1855 (DEFS. EXH. 1, PAGE 13; JOINT APPENDIX PAGE 956)

CHIPPEWA LAND CESSIONS, 1837–1855